Nos. 90-1341 and 90-1517

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES DEPARTMENT OF ENERGY, PETITIONER

v.

STATE OF OHIO, ET AL.

STATE OF OHIO, ET AL., CROSS-PETITIONERS

v.

UNITED STATES DEPARTMENT OF ENERGY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: FEBRUARY 22, 1991
CROSS-PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 26, 1991
CERTIORARI GRANTED: JUNE 3, 1991

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* The opinion and judgment of the court of appeals, the order of the court of appeals denying rehearing, and the opinion of the district court are printed in the appendix to the petition for writ of certiorari and have not been reproduced here.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
3/11/86	1	Complaint filed. Summons issued to pltfs counsel for service.
11/7/86	20	MOTION TO DISMISS and MOTION TO STAY CLAIM FOR NATURAL RESOURCE DAMAGES by U.S. Dept of Energy
3/18/88	74	ORDER (J. SPIEGEL) DENYING DEFT'S MOT. TO DISMISS.
4/29/88	83	ANSWER OF FEDERAL DEFTS.
8/3/88	89	MOTION TO AMEND the court's March 18, 1988 order and certify such order for interlocutory review under 28:1292.
9/23/88	92	ORDER GRANTING MOT. TO AMEND ORDER ENTERED MAR 18, 1988 & certifying such order for interlocutory review, etc.
12/2/88	94	STIPULATION between DEPT OF ENERGY & STATE OF OHIO to OHIO's claims for civil penalties.
12/2/88	95	CONSENT DECREE entered by J. Spiegel.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 89-3329 and 88-8350

STATE OF OHIO; ANTHONY J. CELEBREZZE, JR.,
Attorney General

v.

U.S. DEPARTMENT OF ENERGY

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/17/89	ORDER filed: defendant-petitioner's petition for permission to appeal is GRANTED * * *
6/11/90	OPINION filed: AFFIRMED * * *
6/11/90	JUDGMENT: AFFIRMED * * *
10/10/90	ORDER filed denying petition for en banc rehearing * * *
10/18/90	MANDATE ISSUED * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-86-0217

STATE OF OHIO, EX REL. ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO
30 East Broad Street
Columbus, OH 43215, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY
1000 Independence Ave., S.W.
Washington, D.C. 20585

and

JOHN S. HERRINGTON
Secretary of Energy
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

and

NLO, INC.
P.O. Box 39158
Cincinnati, OH 45239

and

NL INDUSTRIES, INC.
1230 Avenue of the Americas
New York, NY 10020, DEFENDANTS

COMPLAINT

[Filed Mar. 11, 1986]

I. NATURE OF THE ACTION

1. This is a civil action brought by the State of Ohio on the relation of its Attorney General and at the re-

quest of the Director of Environmental Protection for injunctive relief, damages, civil penalties, and declaratory relief against the Defendants: the U.S. Department of Energy (hereinafter "DOE"), the Secretary of Energy (hereinafter "Herrington"), and their contractors at the Feed Materials Production Center, NLO, Inc. (hereinafter "NLO") and NL Industries, Inc. (hereinafter "NL Industries"). At this site, the Defendants have stored and disposed of hazardous wastes in pits, drums, and other devices in violation of state and federal hazardous waste laws and regulations, they have released radioactive materials and other hazardous substances into the air, water, and soil, and they have polluted surface water and groundwater with chemical and radioactive contaminants. This pollution, as well as threats of future pollution, presents a serious danger to the environment and natural resources of the State of Ohio and to the health and safety of its citizens. By this action, Plaintiff seeks the following relief against the entities creating and/or maintaining this dangerous situation: (1) reimbursement of the response costs the State has incurred and will incur to prevent, minimize, investigate, and/or eliminate the threat which the site poses to the public health and safety and the environment; (2) damages the State's natural resources have sustained and will sustain as a result of releases of hazardous substances from the site into the environment; (3) injunctive relief; (4) civil penalties; (5) declaratory relief; and (6) mandamus, which are sought pursuant to (a) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Sections 9601 *et seq.* (b) the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sections 6901 *et seq.*, and the regulations promulgated thereunder; (c) the Clean Water Act ("CWA"), 33 U.S.C. Sections 1251 *et seq.*; (d) the Ohio Solid and Hazardous Waste Control Act, Ohio Revised Code Chapter 3734, and the rules promulgated thereunder; (e) the Ohio Water Pollution Control Act, Ohio Revised Code Chapter 6111, and the rules promul-

gated thereunder; (f) the Federal Declaratory Judgment Act, 28 U.S.C. Section 2201; and (g) 28 U.S.C. Section 1361 (mandamus to compel an officer or agency of the United States to perform duty); (h) Executive Order 12088; and (i) the Administrative Procedure Act, 5 U.S.C. Sections 551 *et seq.*

II. JURISDICTION

2. This Court has subject matter jurisdiction over the claims asserted herein under federal law pursuant to 42 U.S.C. Section 9613(b) (CERCLA), 42 U.S.C. Section 6972(a) (RCRA), 33 U.S.C. Section 1365(a) (CWA), 28 U.S.C. Section 1331 (federal question), 28 U.S.C. Section 1361 (mandamus), and 28 U.S.C. Section 2201 (declaratory judgment), and 28 U.S.C. Section 1337 (interstate commerce). The Court has pendent jurisdiction over the claims asserted under the laws of the State of Ohio.

3. By letters dated December 18, 1984 and February 20, 1986, Plaintiff notified the Administrator of the United States Environmental Protection Agency ("U.S. EPA") of the violations of RCRA described in this Complaint and stated the State's intent to file suit, as required by 42 U.S.C. Section 6972(C). The notices were also sent to DOE, NLO, NL Industries, and the Secretary of Energy. The Administrator, Secretary, DOE, NLO, and NL Industries received the December 18, 1984 notice more than sixty days prior to the filing of this lawsuit. The second notice, containing notice of violations of RCRA Subtitle C only, was received by the Defendants prior to institution of this lawsuit, as required by 42 U.S.C. Section 6972(c). Copies of these notices are attached hereto as Exhibits A and B and are fully incorporated herein by reference.

4. By letter dated December 18, 1984, Plaintiff notified the Administrator of U.S. EPA, DOE, NL Industries, and the Secretary of the violations of the CWA described in this Complaint, as required by 33 U.S.C. Section 1365(b).

The Administrator, DOE, NLO, NL Industries, and the Secretary received this notice more than sixty days prior to the filing of this lawsuit. A copy of this notice is attached hereto as Exhibit C and is fully incorporated herein by reference.

5. By a letter which was dated November 1, 1985 and which was received by its addressees more than sixty days ago, Plaintiff presented DOE, Herrington, NLO, and NL Industries with a claim of $206,066,792.49 for past and future costs of investigating and cleaning up the hazardous substances released by these Defendants at the Feed Materials Production Center. The letter also presented a claim of $205,000,000.00 to reimburse the State for damages to its natural resources damages. This letter is attached hereto as Exhibit D and is fully incorporated herein by reference.

III. VENUE

6. Venue is proper in this Court pursuant to 28 U.S.C. Section 1391, 42 U.S.C. Section 9613(b), 33 U.S.C. Section 1365(c), and 42 U.S.C. Section 6972(a).

IV. PARTIES

A. *The Plaintiff And The Plaintiff's Relator.*

7. The Plaintiff is the State of Ohio, which holds all natural resources, including the air, lands, and waters located within its political boundaries, in trust for the benefit of its citizens. As trustee of the natural resources located within its boundaries, Plaintiff owes a fiduciary duty to its citizens to protect and conserve its natural resources. As trustee of these natural resources, Plaintiff has been injured by the pollution of these natural resources with hazardous materials and water contaminants caused by the actions of the Defendants as described herein.

8. Plaintiff's relator is Anthony J. Celebrezze, Jr., Attorney General of Ohio. By virtue of his office, Attorney General Celebrezze is the chief legal officer of the State of Ohio. Plaintiff's relator institutes this action on behalf of the State of Ohio and at the request of the Director of Environmental Protection, State of Ohio, who is charged under Ohio law with the responsibility of protecting the air, lands, and waters located within Plaintiff's boundaries from pollution, degradation, and contamination.

B. *The Defendants.*

9. Defendant DOE is an executive department of the United States under 42 U.S.C. Section 7131. DOE owns the Feed Materials Production Center and is charged with responsibility for all operations at that site.

10. John S. Herrington is named as a Defendant in his official capacity as the Secretary of DOE and as the successor to Donald P. Hodel, the former Secretary of Energy. Under 42 U.S.C. Section 7131, he is responsible for, and has the authority necessary to administer, all affairs of DOE. Defendant Herrington's office is located at the DOE headquarters in Washington, D.C.

11. NLO is a corporation incorporated under the laws of the State of Ohio, with its principal office located in Cleveland, Ohio.

12. At all times pertinent to the allegations of this Complaint, NLO has been a wholly-owned subsidiary of NL Industries.

13. NL Industries is a corporation incorporated under the laws of the State of New Jersey, with its principal office located in New York City, New York and its principal Ohio office located in Cincinnati. NL Industries does business in several Ohio counties.

14. At all times pertinent to the allegations of this Complaint, NL Industries has dominated and controlled the activities of NLO. All of the actions of NLO complained of herein have been controlled by and/or subject

to the control of NL Industries. NL Industries knew and/or should have been aware of the actions of NLO complained of in this Complaint.

V. FACTS OF THE CASE

15. The Feed Materials Production Center ("FMPC") is a large-scale production facility which supplies uranium metal used in the fabrication of fuel cores for nuclear reactors owned by DOE. Located at 7400 Willey Road, only one mile from Fernald, Ohio, it includes approximately 1,050 acres of buildings or structures, installations, equipment, and grounds, mostly contained in Hamilton County, Ohio.

16. The FMPC is also located near the owns of Ross, New Baltimore, and Shendon. A population of more than 10,000 people resides within 5 miles of the FMPC, a population of more than 60,000 lives within 6 miles, and more than 227,000 persons live within 10 miles of the site.

17. The FMPC is situated in the Great Miami River [illegible] Natural drainage from much of the site runs into [illegible] Run, a tributary of the Great Miami River. Botn the Great Miami River and Paddy's Run are "navigable waters" and "waters of the state", as those terms are defined by 33 U.S.C. Section 1362(7) and Ohio Revised Code Section 6111.01(H), respectively.

18. At the FMPC, Defendants have "stored", "treated", and/or "disposed" of "hazardous waste", as those terms are defined by 42 U.S.C. Section 6903, 40 CFR 261.3, Ohio Revised Code Section 3734.01, Ohio Administrative Code ("O.A.C.") 3745-51-03 and O.A.C. 3745-50-10(A), including barium chloride salt bath sludge, a spent eutectic salt mixture, methylene chloride, perchlorethylene, 1,1,1-trichloroethane, 1,1,2-trichloroethane, benzene isomers, phthalates, and aryl sulfonamides.

19. Most of the hazardous wastes identified in paragraph 18 above have been and/or are being stored at the FMPC in drums or tanks. Current hazardous waste stor-

age facilities at the FMPC include at least one waste storage tank area and two drum storage areas.

20. Defendants have stored and/or disposed of hazardous waste by burying it at the FMPC. For example, Defendants have dumped barium chloride salt bath sludge into a pit known as Waste Pit 4, and subsequently covered it with soil and other waste materials. Liquid collected in Waste Pit 4 has been disposed in Waste Pit 5. Defendants have also disposed of hazardous wastes by allowing them to leak from drums into the environment.

21. Defendants' treatment of hazardous waste has included treatment of eutectic salt mixture at an installation known as the FMPC Pilot Plant Treatment Facilities.

22. As a result of Defendants' unlawful hazardous waste treatment, storage, and/or disposal practices, hazardous constituents have contaminated the groundwater at the FMPC.

23. Waste Pit 4, the Pilot Plant Treatment Facilities, the waste storage tank area, the drum storage areas, and all other land, appurtenances, structures, and improvements which, since 1979, have been or are being used for the treatment, storage, and/or disposal of hazardous waste are "facilities" or "hazardous waste facilities" as those terms are defined by 40 CFR 260.10, Ohio Revised Code Section 3734.01(N), and O.A.C. 3745-50-10(A)(22). Hereinafter they shall be referred to as the "FMPC hazardous waste facilities".

24. At all times pertinent to this lawsuit, DOE has been the "owner" and an "operator" of the FMPC hazardous waste facilities, as the terms "owner" and "operator" are defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(55) and (54).

25. From 1979 until sometime in 1986, NLO and NL Industries were the "operators" of the FMPC hazardous waste facilities, as the term "operator" is defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(54).

26. 42 U.S.C. Section 6961 provides that each department, agency, and instrumentality of the executive branch

of the federal government is subject to and must comply with all federal and state hazardous and solid waste requirements, both procedural and substantive, in the same manner and to the same extent as any other person subject to these requirements.

27. Defendants have stored, treated, and disposed of hazardous waste at the FMPC in blatant disregard for both federal and state hazardous waste requirements.

28. Large quantities of radioactive wastes have been dumped into at least six pits at the FMPC and otherwise stored and/or disposed at the site. Radioactive effluents and run-off have been discharged into Paddy's Run. Tons of radioactive uranium have been emitted into the air by smokestacks at the FMPC. Radioactive radon has been emitted into the air by two silos at the FMPC containing radium and other radioactive waste. A third silo also contains radioactive waste. Radiation-contaminated debris has been discarded or piled on the ground. These radioactive substances have contaminated and continue to contaminate the soil, air, surface water, and groundwater at and near the FMPC, including the water in several wells owned by neighbors of the FMPC.

29. On October 2, 1980, U.S. EPA lawfully issued to DOE National Pollutant Discharge Elimination System Permit Number OH 0009580 (hereinafter "NPDES Permit"). The NPDES Permit, attached hereto as Exhibit E and incorporated fully herein by reference, may be enforced by the State of Ohio pursuant to Ohio Revised Code Section 6111.04, 33 U.S.C. Sections 1323 and 1342, and 40 Code of Federal Regulations ("CFR") Part 123.

30. The NPDES Permit authorizes the Defendants to discharge process wastewater, stormwater runoff, and other wastes from pipes and sewers at the FMPC into the Great Miami River and Paddy's Run. These wastes are "pollutants", "industrial wastes", and "other wastes", as those terms are defined by 33 U.S.C. Section 1362(6), Ohio Revised Code Section 6111.01(C), and Ohio Revised Code Section 6111.01(D), respectively. The pipes are

"point sources", as that term is defined by 33 U.S.C. Section 1362(14). The NPDES Permit establishes effluent limitations restricting the amount of hexavalent chromium, copper, ammonia, nitrates, suspended solids, and other pollutants which may be lawfully discharged from the pipes into the Great Miami River and Paddy's Run.

31. The NPDES Permit (page 10) also establishes a schedule requiring the Defendants to install and operate facilities for biodenitrification and diversion of coal pile runoff (hereinatfer the "water pollution control facilities") to remove nitrates, ammonia, iron, and suspended solids from the effluent discharged by Defendants into the Great Miami River and Paddy's Run.

32. Pursuant to 33 U.S.C. Section 1323, each department, agency, or instrumentality of the executive branch of the federal government is subject to and must comply with all federal and state water pollution requirements to the same extent as any nongovernmental entity.

33. Defendants have violated the effluent limitations of their permit and have failed to construct the water pollution control facilities in accordance with the schedule of the permit, thereby violating both federal and state law.

34. Defendants DOE and Herrington continue to violate federal and state hazardous waste and water pollution laws and regulations at the FMPC. These violations will continue unless restrained by this Court and Plaintiff has no adequate remedy at law.

35. The general allegations contained in paragraphs 1 through 34 are applicable to each count of this Complaint, and are incorporated by reference into each as if fully restated therein.

A. *CERCLA Superfund Claims.*

COUNT ONE

36. The radioactive substances described in paragraph 28 above constitute "hazardous substances", as that term is defined by 42 U.S.C. Section 9601(14).

37. The hazardous wastes described in paragraphs 18 and 20 above are "hazardous substances", as that term is defined by 42 U.S.C. Section 9601(14).

38. The hazardous substances described in paragraphs 18, 20, and 28 above have been "released" and are threatened to be "released" into the "environment", as those terms are defined by 42 U.S.C. Section 9601(22) and (8) respectively.

39. The FMPC and its buildings, structures, installations, equipment, pipes, pits, landfills, and storage containers, including but not limited to large areas of land that have been contaminated with hazardous substances, are "facilities" as that term is defined by 42 U.S.C. Section 9601(9).

40. Defendant DOE is currently the "owner" and "operator" of the FMPC, as those terms are defined by 42 U.S.C. Section 9601(20), and was the "owner" and "operator" of the FMPC during the time the hazardous substances described in paragraphs 18, 20, 28, 36, 37, and 38 above were disposed at the FMPC.

41. Defendant Herrington is the current "owner" and/or "operator" of the FMPC, as those terms are defined by 42 U.S.C. Section 9601(20).

42. Defendants NLO and NL Industries were "operators" of the FMPC, as that term is defined by 42 U.S.C. Section 9601(20), during the time that the hazardous substances described in paragraphs 18, 20, 28, 36, 37, and 38 were disposed at the FMPC.

43. To prevent, minimize, and mitigate the damage to public health, welfare, and the environment which has resulted and which may result from the releases and threatened releases of hazardous substances from the FMPC, Plaintiff has undertaken a continuing program of "response" actions for the FMPC, as that term is defined by 42 U.S.C. Section 9601(25). Since 1984, Plaintiff has incurred response costs of more than $84,000.00 to monitor, assess, and evaluate the releases and threatened releases of hazardous substances from the FMPC,

including groundwater sampling and laboratory analysis, site inspections and investigations, modeling, and other activities. Plaintiff will continue to incur response costs in order to prevent further injury to public health, welfare and the environment from releases and threatened releases at and from the FMPC. The response actions and costs described in this paragraph are not inconsistent with the National Contingency Plan.

44. Pursuant to 42 U.S.C. Section 6907(g), each department, agency, or instrumentality of the executive branch of the federal government is subject to and must comply with CERCLA, including liability under 42 U.S.C. Section 9607, in the same manner and to the same extent as any nongovernmental entity.

45. Pursuant to 42 U.S.C. Section 9607(a) and (g), Defendants are jointly and severally liable for all costs of removal and remedial action which have been incurred and which will be incurred by Plaintiff, including reasonable attorneys fees for maintaining this action.

COUNT TWO

46. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 36 through 45 above as if fully set forth herein.

47. Pursuant to 42 U.S.C. Section 9607(g) and 9611 (h), the State of Ohio is the trustee for the "natural resources" on, over, under, and adjacent to the FMPC, as the term "natural resources" is defined by 42 U.S.C. Section 9601(16).

48. As a result of the releases of hazardous substances from the FMPC into the natural resources held in trust by and appertaining to the State of Ohio which are located on, over, under, and adjacent to the FMPC, including land, air, water, ground water, drinking water supplies, and other resources, these natural resources have been and continue to be injured, destroyed, and lost.

49. Pursuant to 42 U.S.C. Section 9607(a), Defendants are jointly and severally liable to the State of Ohio

for damages for the injury, destruction, and loss of natural resources on, over, under, and adjacent to the FMPC, including the reasonable costs of assessing such injury, destruction, and loss.

B. *Solid And Hazardous Waste Violations.*

COUNT THREE

50. 42 U.S.C. Section 6925(a) prohibits any person from using a facility for the treatment, storage, or disposal of hazardous waste except in accordance with a RCRA permit issued by the Administrator of U.S. EPA.

51. 42 U.S.C. Section 6925(e) and 40 CFR 270.70 (formerly numbered 40 CFR 122.23) provide that a person owning or operating such a facility on November 19, 1980 may continue to operate the facility during U.S. EPA review of his application for a RCRA permit only if the person has submitted the permit application in compliance with U.S. EPA regulations and has submitted hazardous waste notification(s) to the Administrator in compliance with 42 U.S.C. Section 6930. Such operation under RCRA Section 3005(e) and 40 CFR 270.70 is known as "interim status". 40 CFR 270.10 (formerly numbered 40 CFR 122.22) required Defendants to submit to U.S. EPA Part A of the permit application for the FMPC hazardous waste facilities by November 19, 1980.

52. Defendants have not timely submitted to U.S. EPA a Part A permit application complying with the requirements of 40 CFR Part 270 for the FMPC hazardous waste facilities existing on November 19, 1980. Because of Defendants' failures to comply with 42 U.S.C. Section 6925(e) and 40 CFR 270.70, the FMPC hazardous waste facilities existing on November 19, 1980 have not qualified for interim status under federal law.

53. Since November 19, 1980, 40 CFR 270.10(f) (formerly numbered 40 CFR 122.22(b)) has prohibited any person from beginning construction of land, appur-

tenances, structures, and improvements to be used for the treatment, storage, or disposal of hazardous waste, unless the person has first submitted Parts A and B of a permit application to U.S. EPA and received a RCRA permit.

54. Despite the prohibitions of 40 CFR 270.10(f) (40 CFR 122.22(b)), the Defendants, after November 19, 1980, constructed the Pilot Plant Treatment Facilities and other facilities for the treatment, storage, and/or disposal of hazardous waste at the FMPC without first applying for and receiving a RCRA permit for such construction.

55. Defendants continued to treat, store, and/or dispose of hazardous waste at the FMPC hazardous waste facilities which were existing on November 19, 1980 as well as the facilities which were constructed after that date, even though Defendants had failed to obtain a permit for these activities at any of the FMPC hazardous waste facilities. Defendants DOE and Herrington currently are continuing to treat, store, and/or dispose of hazardous waste at these facilities.

56. Since March 19, 1979, Ohio Revised Code Sections 3734.02(E) and 3734.05(B) have prohibited persons from operating a hazardous waste facility without first obtaining a hazardous waste facility installation and operation permit from the Ohio hazardous waste facility board.

57. Since March 19, 1979, Defendants have operated and continue to operate the FMPC hazardous waste facilities without obtaining a hazardous waste facility installation and operation permit.

58. Since March 19, 1979, Ohio Revised Code Section 3734.02(F) has prohibited any person from treating, storing, or disposing of hazardous waste at any premises other than the lawfully operated facilities listed in subsection (F).

59. Since March 19, 1979, Defendants have treated, stored, and/or disposed, and continue to treat, store, and

dispose, of hazardous waste at the FMPC hazardous waste facilities, which are not among the lawfully operated facilities listed in Ohio Revised Code Section 3734.02(F).

60. Defendants' treatment, storage, and/or disposal of hazardous waste at the FMPC hazardous waste facilities and failures to obtain a permit from U.S. EPA are violations of 42 U.S.C. Section 6925(a) and 40 CFR 270.10, for which each of Defendants is subject to injunctive relief and a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation pursuant to 42 U.S.C. Sections 6928 and 6972.

61. In a similar manner, Defendants' operation of, and treatment, storage, and disposal of hazardous waste at, the FMPC hazardous waste facilities are violations of Ohio Revised Code Sections 3734.02(E), 3734.02(F), 3734.05(B), and 3734.11, for which each of Defendants is subject to injunctive relief pursuant to Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FOUR

62. Since November 19, 1980, 40 CFR 264.31 and 40 CFR 265.31 have required owners and operators of a hazardous waste facility to maintain and operate the facility in a manner that minimizes the possibility of an unplanned release of hazardous waste or hazardous waste constituents to the air, soil, or surface water which could threaten human health or the environment. O.A.C. 3745-54-31 and O.A.C. 3745-65-31 [1] have contained the same requirements since April 15, 1981.

63. Since the effective dates of these rules and regulations, Defendants have failed and continue to fail to maintain and operate the FMPC hazardous waste facilities, including but not limited to drums of hazardous

[1] Formerly numbered O.A.C. 3745-55-31.

waste and Waste Pit 4, in a manner that minimizes the unplanned release of hazardous waste and/or hazardous waste constituents to the soil and surface water which could threaten human health and the environment.

64. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.31, 40 CFR 265.31, O.A.C. 3745-54-31, and/or O.A.C. 3745-65-31, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Section 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FIVE

65. Since November 19, 1980, 40 CFR 264.56(b) and 40 CFR 265.56(b) have required the owners and operators of a hazardous waste facility, through their emergency coordinator, to immediately identify the character, exact source, amount, and areal extent of any hazardous waste or hazardous waste constituents which have been released from the facility. O.A.C. 3745-54-56(B) and O.A.C. 3745-65-56(B)[2] have contained the same requirements since April 15, 1981.

66. From an unknown date until the present, Defendants have failed and continue to fail to immediately identify the character, exact source, amount, and areal extent of hazardous waste and hazardous waste constituents that have been released from the FMPC hazardous waste facilities, including but not limited to Waste Pit 4.

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[2] Formerly numbered O.A.C. 3745-55-56(B).

67. Since November 19, 1980, 40 CFR 264.56(c) and 40 CFR 265.56(c) have required the owners and operators of a hazardous waste facility, through their emergency coordinator, to assess possible hazards to human health or the environment that may result from releases of hazardous waste or hazardous waste constituents from the facility. O.A.C. 3745-54-56(C) and O.A.C. 3745-65-56(C)[3] have contained the same requirement since April 15, 1981.

68. From an unknown date until the present, Defendants have failed and continue to fail to assess possible hazards to human health or the environment that may result from releases of hazardous waste or hazardous waste constituents from the FMPC hazardous waste facilities, including but not limited to leaking drums and Waste Pit 4.

69. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.56, 40 CFR 265.56, O.A.C. 3745-54-56, and/or O.A.C. 3745-65-56, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SIX

70. Since November 19, 1980, 40 CFR 264.56(j) and 40 CFR 265.56(j) have required the owners and operators of a hazardous waste facility to submit to U.S. EPA written reports within fifteen days providing the informa-

[3] Formerly numbered O.A.C. 3745-55-56(C).

tion about releases described in that subsection. Since April 15, 1981, O.A.C. 3745-54-56(j) and O.A.C. 3745-65-56(j)[4] have required the same written reports to be submitted to Ohio EPA.

71. From an unknown date until the present, Defendants have failed and continue to fail to submit to U.S. EPA and Ohio EPA written reports containing the information required by these rules and about releases at the FMPC regulating hazardous waste facilities. These releases include but are not limited to leakage of hazardous waste from drums which have in the past been stored at the FMPC and releases of hazardous waste from Waste Pit 4, which continues to occur.

72. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.56(j), 40 CFR 265.56(j), O.A.C. 3745-54-56(j), and/or O.A.C. 3745-65-56(j), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Section 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SEVEN

73. 40 CFR Part 265, Subpart F requires that, by November 19, 1981, the owners and operators of any surface impoundment or landfill which is used to manage hazardous waste must implement a groundwater monitoring program in compliance with 40 CFR 265, Subpart F. 40 CFR Part 264, Subpart F requires that, by January 26, 1983, the owners and operators of any surface

[4] Formerly numbered O.A.C. 3745-55-56(j).

impoundment or landfill used to treat, store, or dispose of hazardous waste must implement a groundwater monitoring program in compliance with 40 CFR 264, Subpart F. The same requirements have been mandated by O.A.C. 3745-54-90 through 99 since August 30, 1984 and have been mandated by O.A.C. 3745-65-90 through 94[5] since November 19, 1981.

74. Waste Pit 4 at the FMPC is either a "landfill" or a "surface impoundment" as those terms are defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(42) and (78).

75. Defendants have failed and continue to fail to implement a groundwater monitoring system for Waste Pit 4 which complies with the requirements of 40 CFR 265 Subpart F, 40 CFR 264 Subpart F, O.A.C. 3745-65-90 through 94, and/or O.A.C. 3745-54-90 through 99.

76. Defendants' failure to comply with the groundwater monitoring requirements described in this Count of the Complaint are violations of 40 CFR 265 Subpart F, 40 CFR 264 Subpart F, O.A.C. 3745-65-90 through 94, and/or O.A.C. 3745-54-90 through 99, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each of Defendants is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.12(C).

COUNT EIGHT

77. 40 CFR 264.112 requires that the owners and operators of a hazardous waste facility submit to U.S. EPA, by July 13, 1981, a written closure plan for the facility meeting the requirements of the regulation. 40

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[5] Formerly numbered O.A.C. 3745-55-90 through 94.

CFR 265.112 requires submission of this closure plan by May 19, 1981. In a similar manner O.A.C. 3745-55-12 [6], and O.A.C. 3745-66-12 require submission of the closure plan by April 15, 1981 and January 7, 1983, respectively.

78. Defendants failed to submit a closure plan for any of the FMPC hazardous waste facilities until approximately July of 1984, when it submitted a closure plan for some of these facilities. Defendants still have not submitted a closure plan for Waste Pit 4 that complies with the requirements of 40 CFR 264.112, 40 CFR 265.112, O.A.C. 3745-55-12, and/or O.A.C. 3745-66-12.

79. Since July 13, 1981, 40 CFR 264.113 and 40 CFR 265.113 have required the owners and operators of a hazardous waste faciilty to treat, remove, or dispose of the hazardous waste contained in the facility within 90 days after receiving the final volume of hazardous waste at the facility. These treatment, removal and disposal actions must be performed in accordance with an approved closure plan. All other closure activities must be completed in accordance with an approved closure plan within 180 days after receipt of the final volume of hazardous wastes, or in the case of 40 CFR 265.113, within 180 days after approval of the closure plan if that is later. These same requirements have been mandated by O.A.C. 3745-55-13 [7] and O.A.C. 3745-66-13 since January 7, 1983.

80. Even though Defendants deposited the final volume of hazardous wastes into Waste Pit 4 in approximately April of 1983, Defendants have not yet closed Waste Pit 4 in accordance with an approved closure plan.

81. Since July 13, 1981, 40 CFR 264.111 and 40 CFR 265.111 have required the owners and operators of a hazardous waste facility to close the facility in a manner that, to the extent necessary to prevent threats to human health and the environment, controls, minimizes, or elim-

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[6] Formerly numbered O.A.C. 3745-56-03.

[7] Formerly numbered O.A.C. 3745-56-04.

inates post-closure escape of hazardous waste, hazardous waste constituents, leachate, contaminated rainfall, or waste decomposition products to the ground waters, surface waters, or atmosphere. The same requirements have been contained in O.A.C. 3745-55-11 [8] since April 15, 1981 and in O.A.C. 3745-66-11 since January 7, 1983.

82. Even though hazardous waste has not been placed in Waste Pit 4 since approximately April of 1983, Defendants have not closed Waste Pit 4 in a manner that complies with 40 CFR 264.111, 40 CFR 265.111, O.A.C. 3745-55-11, or O.A.C. 3745-66-11.

83. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.111, 40 CFR 264.112, 40 CFR 264.113, 40 CFR 265.111, 40 CFR 265.112, 40 CFR 265.113, O.A.C. 3745-55-11, O.A.C. 3745-55-12, O.A.C. 3745-55-13, and/or O.A.C. 3745-66-11, O.A.C. 3745-66-12, and O.A.C. 3745-66-13, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT NINE

84. Since July 13, 1981, 40 CFR 264.173 has prohibited the owners and operators of a hazardous waste facility from handling and storing a container of hazardous waste in a manner which may rupture the container or cause it to leak. This conduct has been prohibited by 40 CFR 265.173 since November 19, 1980,

[8] Formerly numbered O.A.C. 3745-56-02.

by O.A.C. 3745-55-73[9] since April 15, 1981 and by O.A.C. 3745-66-73 since January 7, 1983.

85. During an unknown period of time ending in approximately April of 1984, Defendants handled and stored containers of hazardous waste in a manner that caused them to leak.

86. Since July 13, 1981, 40 CFR 264.171 has required the owners and operators of a hazardous waste facility to transfer hazardous waste from a leaking container or a container not in good condition to a container which is in good condition or to manage the waste in some other way that complies with the hazardous waste facility standards. This same requirement has been mandated by 40 CFR 265.171 since November 19, 1980, by O.A.C. 3745-55-71[10] since April 15, 1981, and by O.A.C. 3745-66-71 since January 7, 1983.

87. During an unknown time period ending in approximately April of 1984, Defendants failed to transfer hazardous waste from containers at the FMPC which were leaking or not in good condition to containers which were in good condition, or to manage the waste in some other way that complied with the hazardous waste facility standards.

88. Since July 13, 1981, 40 CFR 264.174 has required owners and operators of a hazardous waste facility to at least weekly inspect container storage areas, looking for leaking and deteriorated containers. This same requirement has been mandated by 40 CFR 265.174 since November 19, 1980, by O.A.C. 3745-55-74[11] since April 15, 1981, and by O.A.C. 3745-66-74 since January 7, 1983.

89. During an unknown period of time ending in approximately April of 1984, Defendants failed to at least weekly inspect the container storage area at the FMPC.

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[9] Formerly numbered O.A.C. 3745-56-53.

[10] Formerly numbered O.A.C. 3745-56-51.

[11] Formerly numbered O.A.C. 3745-56-54.

90. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.171, 40 CFR 264.173, 40 CFR 264.174, 40 CFR 265.171, 40 CFR 265.173, 40 CFR 265.174, O.A.C. 3745-55-11, O.A.C. 3745-55-73, O.A.C. 3745-55-74, and/or O.A.C. 3745-66-71, O.A.C. 3745-66-73, and O.A.C. 3745-66-74, as well as Ohio Revised Code Section 3734-11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928 (g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT TEN

91. Since November 19, 1980, 40 CFR 264.15(b) and 40 CFR 265.15(b) have required the owners and operators of a hazardous waste facility to develop and follow a written inspection schedule to prevent, detect, and respond to environmental and human health hazards and to keep this schedule at the facility. O.A.C. 3745-54-15(B) and O.A.C. 3745-65-15(B)[12] have contained the same requirements since April 15, 1981.

92. From the effective dates of these rules and regulations until approximately July of 1984, Defendants failed to develop and follow a written inspection schedule and to keep this schedule at the FMPC.

93. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.15(b), 40 CFR 265.15(b), O.A.C. 3745-54-15(B), and/or O.A.C. 3745-65-15(B), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive

[12] Formerly numbered O.A.C. 3745-55-15(B).

relief pursuant to 42 U.S.C. Sections 6928(a) and 6972 (a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928 (g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT ELEVEN

94. Since November 19, 1980, 40 CFR 264.35 and 40 CFR 265.35 have required the owners and operators of a hazardous waste facility to maintain aisle space at the facility adequate to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation during an emergency. O.A.C. 3745-54-35 and O.A.C. 3745-65-35 [13] have contained the same requirements since April 15, 1981.

95. For an unknown period of time ending in approximately April of 1984, Defendants failed to maintain at the FMPC hazardous waste facilities the aisle space required by these rules and regulations.

96. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.35, 40 CFR 265.35, O.A.C. 3745-54-35, and/or O.A.C. 3745-65-35, as well as Ohio Revised Code Section 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

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[13] Formerly numbered O.A.C. 3745-55-35.

COUNT TWELVE

97. Since November 19, 1980, 40 CFR 264.51(a) and 40 CFR 265.51(a) have required the owners and operators of a hazardous waste facility to have a contingency plan for the facility designed to minimize hazards to human health or the environment from fires, explosions, or releases of hazardous waste to the air, soil, or surface water. O.A.C. 3745-54-51(A) and O.A.C. 3745-65-51(A)[14] have contained the same requirements since April 15, 1981. ("Contingency plan" is defined by 40 CFR 260.10 and O.A.C. 3745-50-10(A)(13)).

98. From the effective dates of these rules and regulations until approximately July of 1984, Defendants did not have a contingency plan for the FMPC hazardous waste facilities.

99. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.51(a), 40 CFR 265.51(a), O.A.C. 3745-54-51(A), and/or O.A.C. 3745-65-51(A), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT THIRTEEN

100. Since November 19, 1980, 40 CFR 264.73 and 40 CFR 265.73 have required the owners and operators of a hazardous waste facility to keep a written operating record at the facility containing the information about hazardous waste required by those regulations. O.A.C.

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[14] Formerly numbered O.A.C. 3745-55-51(A).

3745-54-73 and O.A.C. 3745-65-73 [15] have contained the same requirements since April 15, 1981.

101. From the effective dates of these rules and regulations until a date unknown to Plaintiff, Defendants failed to keep at the FMPC hazardous waste facilities an operating record containing the information required by these rules and regulations.

102. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.73, 40 CFR 265.73, O.A.C. 3745-54-73, and/or O.A.C. 3745-65-73, as well as Ohio Revised Code Sections 3745-05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulation pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FOURTEEN

103. Since November 19, 1980, 40 CFR 264.16(a), (b), and (c) have required the owners and operators of a hazardous waste facility to implement a program to teach personnel at the facility to perform their hazardous waste management duties and to respond to emergencies. O.A.C. 3745-54-16(A), (B), and (C) and O.A.C. 3745-65-16(A), (B), and (C) [16] have contained the same requirements since April 15, 1981.

104. Since November 19, 1980, 40 CFR 264.16(d) and (e) have required the owners and operators of a hazardous waste facility to maintain and keep personnel job description and training documents and records at

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[15] Formerly numbered O.A.C. 3745-55-73.

[16] Formerly numbered O.A.C. 3745-55-16.

the facility. O.A.C. 3745-54-16(D) and (E) and O.A.C. 3745-65-16(D) and (E) have contained the same requirements since April 15, 1981.

105. From the effective dates of these rules and regulations until a date unknown to Plaintiff, Defendants failed to implement the training program and maintain the records for the FMPC hazardous waste facilities required by these rules and regulations.

106. Defendants' failures to perform the duties described in this Count of the Complaint are violations of 40 CFR 264.16, 40 CFR 265.16, O.A.C. 3745-54-16, and/or O.A.C. 3745-65-16, as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,000.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT FIFTEEN

107. Since November 19, 1980, 40 CFR 264.13 and 40 CFR 265.13 have required the owners and operators of a hazardous waste facility to develop and follow a written waste analysis plan and keep the plan at the facility. O.A.C. 3745-54-13(B) and O.A.C. 3745-65-13(B)[17] have contained the same requirement since April 15, 1981.

108. From the effective dates of these rules and regulations until approximately July of 1984, Defendants failed to develop and follow a written waste analysis plan and failed to keep such a plan at the FMPC hazardous waste facilities.

109. Defendants' failures to perform the duties described in this Count of the Complaint are violations of

[17] Formerly numbered O.A.C. 3745-55-13(B).

40 CFR 264.13(B), 40 CFR 265.13(B), O.A.C. 3745-54-13(B), and/or O.A.C. 3745-65-13(B), as well as Ohio Revised Code Sections 3734.05(F) and 3734.11. For these violations, each Defendant is subject to injunctive relief pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 and is subject to a civil penalty of up to twenty-five thousand dollars ($25,00.00) for each day of each violation of the federal regulations pursuant to 42 U.S.C. Sections 6928(g) and 6972(a) and a civil penalty of up to ten thousand dollars ($10,000.00) for each day of each violation of the state rules pursuant to Ohio Revised Code Section 3734.13(C).

COUNT SIXTEEN

110. Pursuant to 42 U.S.C. Section 6964, DOE and Herrington are required to insure that any solid waste management and disposal on their property, including waste management and disposal by its contractors, complies with the guidelines and purposes of RCRA.

111. Since assuming jurisdiction over the FMPC around 1978, DOE and Herrington have failed and continue to fail to insure that solid waste management and disposal at the FMPC, including the solid waste management and disposal by their contractors, complies with the guidelines and purposes of RCRA.

112. The failures of these Defendants to perform the duties described in this Count are violations of 42 U.S.C. Section 6964, for which these Defendants are subject to injunctive relief pursuant to 42 U.S.C. Section 6928(a) and 6972(a). In the alternative, compliance with 42 U.S.C. Section 6964 is a nondiscretionary duty owed to Plaintiff by DOE and Herrington, and failure to perform this duty is subject to mandamus pursuant to 28 U.S.C. Section 1361.

C. *Water Pollution Violations.*

COUNT SEVENTEEN

113. Defendants have discharged pollutants from the point sources at the FMPC in excess of the effluent limitations in the NPDES Permit. Defendants DOE and Herrington continue to discharge pollutants in excess of these limitations.

114. The effluent limitations violated by Defendants and the dates of violations include but are not limited to the following:

hexavalent chromium (outfalls 001B & 001C)
daily maximum violations—

October 30, 1983
March 23, 1984
March 26, 1984
April 3, 1984
May 17, 1984
May 24, 1984
June 1, 1984
December 19, 1984
July 10, 1985
August 22, 1985
October 24, 1985
November 12, 1985

daily average violations—

October, 1983
December, 1983
March, 1984
May, 1984
June, 1984
July, 1984
October, 1984
December, 1984
January, 1985
February, 1985

July, 1985
August, 1985
October, 1985
November, 1985

total chromium (outfalls 001B & 001C)
daily maximum violation—

August 2, 1984

daily average violation—

August, 1984

copper (outfalls 001B & 001C)
daily maximum violations—

March 23, 1984
July 9, 1984
November 20, 1984
November 12, 1985

daily average violations—

February, 1984
March, 1984
April, 1984
May, 1984
July, 1984
November, 1984
December, 1984
November, 1985

iron (outfalls 001B & 001C)
daily maximum violations—

October 24, 1985
December 3, 1985

daily average violations—

April, 1984
October, 1985
December, 1985

ammonia (outfall 001)
daily maximum violations—

July 6, 1984
July 9, 1984
July 17, 1984
July 25, 1984
August 2, 1984
August 9, 1984
August 13, 1984
August 21, 1984
August 30, 1984

oil and grease
daily maximum violations—

December 22, 1984 (outfall 002)
February 11, 1985 (outfall 001)

suspended solids (outfall 002)
daily maximum violations—

May 15, 1985
November 11, 1985

daily average violation—

October, 1985

suspended solids (outfalls 001B & 001C)
daily maximum violations—

October 22, 1983
April 27, 1984
January 23, 1985
March 18, 1985
November 12, 1985

daily average violations—

April, 1984
July, 1984
November, 1984
January, 1985

March, 1985
July, 1985
November, 1985

115. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT EIGHTEEN

116. Defendants have violated the terms of the NPDES Permit by their failure to submit preliminary design plans for the water pollution control facilities by June 1, 1982.

117. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT NINETEEN

118. Defendants have violated the terms of the NPDES Permit by their failure to submit final plans and specifications for the water pollution control facilities by October 1, 1982.

119. Defendants' failures to perform the duties described in this Count of the Complaint constitute viola-

tions of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY

120. Defendants have violated the terms of the NPDES Permit by their failure to begin construction of the water pollution control facilities by January 1, 1983.

121. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-ONE

122. Defendants have violated the terms of the NPDES Permit by their failure to submit a progress report to the Ohio Environmental Protection Agency ("Ohio EPA") by September 30, 1983 describing their progress in designing and installing the water pollution control facilities.

123. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.09 and is subject to a civil penalty of up to ten

thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-TWO

124. Defendants have violated and continue to violate the terms of the NPDES Permit by their failure to complete construction of the water pollution control facilities by April 1, 1984.

125. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-THREE

126. Defendants have violated and continue to violate the terms of the NPDES Permit by their failure to have the water pollution control facilities operational by June 30, 1984.

127. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-FOUR

128. Defendants have violated the terms of the NPDES Permit by their failure to submit to U.S. EPA or the Ohio Environmental Protection Agency ("Ohio EPA") written notice of noncompliance within fourteen (14) days after their failures to perform the duties described in Counts Twenty through Twenty-Five above.

129. Defendants' failures to perform the duties described in this Count of the Complaint constitute violations of 33 U.S.C. Section 1311(a) and Ohio Revised Code Section 6111.07(A), for which each of Defendants is subject to injunctive relief pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to 33 U.S.C. Sections 1319(d) and 1365(a) and Ohio Revised Code Section 6111.09.

COUNT TWENTY-FIVE

130. During a time period presently unknown to Plaintiff, Defendants have placed or caused to be placed, and continue to place or cause to be placed, industrial wastes and/or other wastes, as defined in Revised Code Section 6111.01(C) and (D), in locations where such wastes have caused pollution of the "waters of the State", as defined in Ohio Revised Code Section 6111.01(H), despite the fact that Defendants have no permit to do so. This pollution includes but is not limited to the contamination of groundwater by hazardous constituents, chemical pollutants, and nitrates from the FMPC.

131. The acts described in this Count of the Complaint constitute violations of Revised Code Sections 6111.04 and 6111.07, for which each Defendant is subject to injunctive relief pursuant to Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to Revised Code Section 6111.09.

COUNT TWENTY-SIX

132. O.A.C. 3745-31-02 prohibits a person from causing, permitting, or allowing the installation or modification of a "disposal system", as that term is defined by Ohio Revised Code Section 6111.01(G), without first obtaining a permit to install from the Director of Environmental Protection.

133. Defendants have begun the installation and/or modification of a disposal system at the FMPC without first obtaining a permit to install from the Director. DOE and Herrington continue this installation and/or modification without a permit to install.

134. The conduct of the Defendants described in this Count of the Complaint constitutes violations of O.A.C. 3745-31-02 and Ohio Revised Code Section 6111.07(A), for which each Defendant is subject to injunctive relief pursuant to Ohio Revised Code Section 6111.07 and is subject to a civil penalty of up to ten thousand dollars ($10,000.00) per day of each violation pursuant to Ohio Revised Code Section 6111.09.

D. *Violations of Executive Order 12088*

COUNT TWENTY-SEVEN

135. Plaintiff hereby incorporates by reference the allegations contained in paragraphs 36 through 134 above as if fully set forth herein.

136. Executive Order 12088, *reprinted at* 42 U.S.C.A. Section 4321, requires each executive agency and each chief administrative officer of an executive agency to ensure that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to federal facilities and activities under control of the agency. Each agency and chief administrative officer is responsible for compliance with all applicable pollution control standards, including the Federal Water Pollution Control Act, 33 U.S.C. Sections 1251 et seq., the Solid Waste Disposal Act, 42 U.S.C. Sections 6901

et seq., and all other substantive, procedural, and other requirements that would apply to a private person.

137. Section 1-2 of Executive Order 12088 requires executive agencies and chief administrative officers to cooperate with state agencies in the prevention, control, and abatement of environmental pollution. This section also requires agencies and chief administrative officers to consult with state agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

138. Section 1-5 of Executive Order 12088 requires each executive agency and chief administrative officer to ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

139. Section 1-6 of Executive Order 12088 requires that, whenever a state agency notifies an executive agency that it is in violation of an applicable pollution control standard, the executive agency shall consult with the notifying agency and provide for its approval a plan and implementation schedule to achieve and maintain compliance as soon as practicable.

140. The conduct of Defendants DOE and Herrington described in this Complaint constitutes violations of "applicable pollution control standards", as that term is defined in Executive Order 12088. Defendants DOE and Herrington have failed and continue to fail to ensure the compliance of the FMPC with all applicable pollution control standards and have failed and continue to fail to ensure that all necessary actions are taken at the FMPC for the prevention, control, and abatement of environmental pollution.

141. With some exceptions, Defendants DOE and Herrington have failed and continued to fail to cooperate with the Ohio Environmental Protection Agency ("Ohio EPA") in the prevention, control, and abatement of environmental pollution and to consult with Ohio EPA concerning the best techniques and methods available for

the prevention, control, and abatement of environmental pollution.

142. Defendants DOE and Herrington have failed to ensure that sufficient funds for compliance with applicable pollution control standards are requested in the DOE budgets.

143. After being notified by Ohio EPA that it was in violation of applicable pollution control standards, Defendants DOE and Herrington have failed and continue to fail to promptly consult with Ohio EPA and/or to provide for its approval a plan and implementation schedule to achieve and maintain compliance with applicable pollution control standards as soon as practicable.

144. The conduct of Defendants described in this count of the Complaint constitutes violations of Executive Order 12088, for which Defendants are subject to injunctive and declaratory relief. Plaintiff has no remedy at law for these violations.

145. The actions and failures of Defendants to act described in this count of the Complaint are "agency actions", as defined by 5 U.S.C. Section 551(13), which adversely affect and aggrieve and inflict legal wrong on Plaintiff. These agency actions are reviewable pursuant to 5 U.S.C. Sections 702 and/or 704 and are subject to declaratory and injunctive relief pursuant to 5 U.S.C. Sections 703 and/or 706.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Pursuant to 42 U.S.C. Section 9607, order Defendants to recompense Plaintiff for response costs which have been incurred and, which will be incurred by Plaintiff to address releases and threatened releases of hazardous substances at and from the FMPC;

B. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that Defendants are jointly and

severally liable for all response costs not inconsistent with the National Contingency Plan incurred by the State to address the releases and threatened releases at and from the FMPC;

C. Pursuant to 42 U.S.C. Section 9607, order Defendants to pay damages to the State of Ohio for the injury to, destruction of, and loss of its natural resources, resulting from releases of hazardous substances at and from the FMPC, including the reasonable costs of assessing such injury, destruction, or loss;

D. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that the actions and failures of Defendants described in Counts Three through Sixteen above are violations of RCRA, Ohio Revised Code Chapter 3734, and the federal and state rules and regulations promulgated pursuant to these statutes;

E. Issue an injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 prohibiting Defendants from violating, and ordering Defendants to comply with, RCRA, Ohio Revised Code Chapter 3734, and the rules and regulations listed in Counts Three through Sixteen above:

F. Issue an injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 prohibiting Defendants from treating, storing, and disposing of hazardous waste unless they have received a Part B Permit from U.S. EPA and a hazardous waste facility installation and operation permit from the Ohio hazardous waste facility board authorizing such treatment, storage, or disposal;

G. Issue a mandatory injunction pursuant to 42 U.S.C. Sections 6928(a) and 6972(a) and Ohio Revised Code Section 3734.10 ordering Defendants to

(1) analyze the soil, surface water, and ground water at the FMPC and at certain locations outside of the FMPC for hazardous waste and hazardous waste constituents, in such a manner and at such locations as approved in writing by the Ohio EPA;

(2) formulate, and submit to Ohio EPA for approval, plans for the removal, treatment, and/or disposal of all hazardous waste at the FMPC and soil, surface water, and ground water at or outside the FMPC that has been contaminated with hazardous waste and hazardous waste constituents from the FMPC; and

(3) remove, treat and/or dispose of the hazardous waste and contaminated soil, surface water, and ground water in accordance with the plan approved by Ohio EPA;

H. Order each of Defendants, pursuant to 42 U.S.C. Sections 6928(g) and 6972(a), to pay a civil penalty of twenty-five thousand dollars ($25,000.00) for each day of each violation of RCRA and the federal regulations promulgated thereunder, and order each of Defendants, pursuant to Ohio Revised Code Section 3734.13(C), to pay into the Ohio hazardous waste facility management special account a civil penalty of ten thousand dollars ($10,000.00) for each day of each violation of Ohio Revised Code Chapter 3734 and the state rules promulgated thereunder;

I. Issue an injunction pursuant to 42 U.S.C. Section 6928(a) and 6972(a) prohibiting Defendants DOE and Herrington from violating, and ordering these Defendants to comply with, 42 U.S.C. Section 6964; in the alternative, issue a writ of mandamus requiring these Defendants to comply with 42 U.S.C. Section 6964;

J. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 declaring that the actions and failures of Defendants described in Counts Seventeen through Twenty-Six above are violations of the CWA, Ohio Revised Code Chapter 6111, and O.A.C. 3745-31-02;

K. Issue an injunction pursuant to 33 U.S.C. Sections 1319(b) and 1365(a) and Ohio Revised Code Section 6111.07 prohibiting Defendants from violating, and ordering Defendants to comply with, the CWA, Ohio Revised Code Chapter 6111, and O.A.C. 3745-31-02;

L. Order each of Defendants, pursuant to 33 U.S.C. Section 1319(d) and 1365(a), to pay a civil penalty of ten thousand dollars ($10,000.00) per day of each violation of the CWA, and order each of Defendants, pursuant to Ohio Revised Code Section 6111.09, to pay into the treasury a civil penalty for each violation of Ohio Revised Code Chapter 6111 and O.A.C. 3745-31-02 in the amount of ten thousand dollars ($10,000.00) per day of each violation;

M. Issue a declaratory judgment pursuant to 28 U.S.C. Section 2201 and/or 5 U.S.C. Section 703 declaring that the actions of Defendants DOE and Herrington described in this Complaint are violations of Executive Order 12088 and issue an injunction prohibiting these Defendants from violating Executive Order 12088;

N. Pursuant to Executive Order 12088 and/or 5 U.S.C. Section 706, compel Defendants DOE and Herrington to perform the duties required by that Executive Order, including but not limited to: (1) complying with federal and state hazardous waste and water pollution laws and regulations; (2) taking all actions necessary to abate, control, and prevent environmental pollution at the FMPC; (3) cooperating and consulting with Ohio EPA in the abatement, control, and prevention of environmental pollution; (4) ensuring that sufficient funds for compliance with applicable pollution control standards are requested, and (5) submitting a plan and implementation schedule for compliance to Ohio EPA for its approval; in the alternative, issue a writ of mandamus pursuant to 28 U.S.C. Section 1361 compelling these duties;

O. Award Plaintiff its costs, disbursements, and reasonable attorneys fees and expert witness fees;

P. Retain jurisdiction of this suit for the purpose of making any order or decree which it may deem necessary at any time to carry out its judgment; and

Q. Grant such other relief as it may deem necessary and just.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

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[Exhibits to Complaint not reproduced]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

ANSWER OF FEDERAL DEFENDANTS

[Filed Apr. 29, 1988]

1. The averments of Paragraph 1 of the Complaint state only legal conclusions as to which no answer is required.

2. The averments of Paragraph 2 of the Complaint state only legal conclusions as to which no answer is required.

3. Answering the averments of Paragraph 3 of the Complaint, U.S. Department of Energy ("DOE") and Secretary of Energy John S. Herrington ("Federal Defendants"), admit that the Secretary of Energy received a copy of Exhibit A to the Complaint more than sixty days prior to March 11, 1986, and a copy of Exhibit B to the Complaint prior to that date. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 3 concerning the EPA Administrator, NLO or NL Industries. To the extent that the averments of Paragraph 3 merely characterize or summarize Exhibits A and B, no answer is required since those documents

are the best evidence of their respective contents. Except as otherwise responded to herein, the averments of Paragraph 3 state only legal conclusions as to which no answer is required.

4. Answering the averments of Paragraph 4 of the Complaint, Federal Defendants admit that the Secretary of Energy received a copy of Exhibit C more than sixty days prior to March 11, 1986. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 4 concerning the EPA Administrator, NLO or NL Industries. To the extent that the averments of Paragraph 4 merely characterize or summarize Exhibit C, no answer is required since that document is the best evidence of its contents. Except as otherwise responded to herein, the averments of Paragraph 4 state only legal conclusions as to which no answer is required.

5. Answering the averments of Paragraph 5 of the Complaint, Federal Defendants admit that the Secretary of Energy received a copy of Exhibit D more than sixty days prior to March 11, 1986. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 5 concerning the EPA Administrator, NLO or NL Industries. Except as responded to herein the averments of Paragraph 5 merely characterize or summarize Exhibit D and, accordingly, no answer is required since that document is the best evidence of its contents.

6. The averments of Paragraph 6 of the Complaint state only legal conclusions as to which no answer is required.

7. Answering the averments of Paragraph 7 of the Complaint, Federal Defendants admit that the State of Ohio is the Plaintiff in this action. Federal Defendants aver that DOE is the natural resources trustee for all property under its control. Except as specifically admitted herein the averments of Paragraph 7 state only legal conclusions as to which no answer is required.

8. Answering the averments of Paragraph 8 of the Complaint, Federal Defendants admit that Anthony J. Celebreeze, Jr., is the Attorney General of Ohio and, by virtue of that office, is the Chief legal officer of the State of Ohio. Federal Defendants are without information sufficient to form a belief as to the truth or falsity of the averment of Paragraph 8 that this action is instituted at the request of the Director of Environmental Protection, State of Ohio. Except as responded to herein, the averments of Paragraph 8 state only legal conclusions as to which no answer is required.

9. Answering the averments of Paragraph 9 of the Complaint, Federal Defendants admit that Defendant DOE is an executive department of the United States of America, and that Defendant DOE has specific statutory responsibility over the Feed Materials Production Center (hereinafter the "FMPC") on behalf of the United States of America, which is the owner of the facility. Except as specifically admitted herein, the averments of Paragraph 9 state only legal conclusions as to which no answer is required.

10. Federal Defendants admit that the averments of the first and third sentences of Paragraph 10 of the Complaint. The averments of the second sentence of Paragraph 10 state only legal conclusions as to which no answer is required.

11. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 11 of the Complaint.

12. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 12 of the Complaint.

13. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 13 of the Complaint.

14. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 14 of the Complaint.

15. Federal Defendants admit the averments of Paragraph 15 of the Complaint.

16. Federal Defendants admit the averments of the first sentence of Paragraph 16 of the Complaint. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of the second sentence of Paragraph 16 of the Complaint.

17. Federal Defendants admit the averments of the first sentence of Paragraph 17 of the Complaint. Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of the second sentence of Paragraph 17 of the Complaint. The third sentence of Paragraph 17 states only legal conclusions as to which no answer is required.

18. Federal Defendants admit that certain hazardous materials, including those set forth in Paragraph 18, have been placed at various times at the FMPC. The remaining averments of Paragraph 18 of the Complaint state only legal conclusions as to which no answer is required.

19. As to the first sentence of Paragraph 19, the Federal Defendants admit that hazardous materials have been placed at the FMPC in drums or tanks. As to the second sentence of Paragraph 19, Federal Defendants admit that the FMPC currently has at least one storage tank area and two drum storage areas. Except as specifically admitted herein, the remaining averments of Paragraph 19 of the Complaint state only legal conclusions as to which no answer is required.

20. As to the first sentence of Paragraph 20, the Federal Defendants admit that hazardous materials have been placed in one or more pits at the FMPC and covered over with soil. As to the second sentence of Paragraph 20, the federal defendants admit that barium chloride salt bath sludge has been placed into Pit 4 and

covered over with soil. Except as specifically admitted herein, the averments of the second sentence of Paragraph 20 are denied. As to the third sentence of Paragraph 20, Federal Defendants aver that rain water collecting in Pit 4 has been pumped away to pit 5. The averments of the fourth sentence of Paragraph 20 are denied. Except as specifically admitted herein the averments of paragraph 20 are denied.

21. As to the averments of Paragraph 21 of the Complaint, Federal Defendants admit that eutectic salt mixture has been processed at the FMPC Pilot Plant. Except as specifically admitted herein, the remaining averments of Paragraph 21 of the Complaint state only legal conclusions as to which no answer is required.

22. Until completion of the Remedial Investigation Feasibility Study ("RI/FS") the Federal defendants are without knowledge sufficient to admit or deny the averments of Paragraph 22 of the Complaint concerning contamination of groundwater. The remaining averments of Paragraph 22 of the Complaint state only legal conclusions as to which no answer is required.

23. The averments of Paragraph 23 of the Complaint state only legal conclusions as to which no answer is required.

24. The averments of Paragraph 24 of the Complaint state only legal conclusions as to which no answer is required.

25. The averments of Paragraph 25 of the Complaint state only legal conclusions as to which no answer is required.

26. The averments of Paragraph 26 of the Complaint state only legal conclusions as to which no answer is required.

27. Federal Defendants deny the averments of Paragraph 27 of the Complaint.

28. As to the averments of the first sentence of Paragraph 28, the Federal Defendants admit that radioactive residues have been placed in six pits at the FMPC site. As to the averments of the sixth sentence of Para-

graph 28, it is admitted that radioactive-contaminated material has been placed on the ground. Except as specifically admitted, the averments of the first and sixth sentence of Paragraph 28 are denied. The averments of the second, third, fourth and fifth sentences are admitted. As to the averments of the seventh sentence of Paragraph 28, Federal Defendants admit that radioactive materials have in the past contaminated the soil, air and surface waters at the FMPC, but until completion of the RI/FS the Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining averments of the seventh sentence of Paragraph 28.

29. Federal Defendants admit the averments of the first sentence of Paragraph 29 of the Complaint and that Exhibit E is a copy of the NPDES permit referred to in that sentence. Except as specifically admitted herein, the remaining averments of Paragraph 29 contain only legal conclusions as to which no answer is required.

30. The averments of the first and fourth sentences of Paragraph 30 of the Complaint merely characterize and summarize Exhibit E and, accordingly, no answer is required since that document is the best evidence of its contents. The averments of the second and third sentences of Paragraph 30 state only legal conclusions as to which no answer is required.

31. The averments of Paragraph 31 of the Complaint merely characterize and summarize Exhibit E and, accordingly, no answer is required since that document is the best evidence of its contents.

32. The averments of Paragraph 32 of the Complaint state only legal conclusions as to which no answer is required.

33. The Federal Defendants admit that at various times they have exceeded certain of the effluent limitations set forth in their NPDES permit, and failed to construct portions of the water pollution control facilities in accordance with the schedule set forth in the permit. The remaining averments of Paragraph 33 of the

Complaint state only legal conclusions as to which no answer is required.

34. The averments contained in the first sentence of Paragraph 33 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants deny the averments contained in the second sentence of Paragraph 34 of the Complaint.

35. Paragraphs 1 through 34 of this Answer are incorporated by reference in response to the allegations of Paragraph 35.

36. The averments of Paragraph 36 of the Complaint state only legal conclusions as to which no answer is required.

37. The averments of Paragraph 37 of the Complaint state only legal conclusions as to which no answer is required.

38. The averments of Paragraph 38 of the Complaint state only legal conclusions as to which no answer is required.

39. The averments of Paragraph 39 of the Complaint state only legal conclusions as to which no answer is required.

40. The averments of Paragraph 40 of the Complaint state only legal conclusions as to which no answer is required.

41. The averments of Paragraph 41 of the Complaint state only legal conclusions as to which no answer is required.

42. The averments of Paragraph 42 of the Complaint state only legal conclusions as to which no answer is required.

43. The averments of Paragraph 43 of the Complaint state only legal conclusions as to which no answer is required. To the extent that Paragraph 43 is deemed to contain averments to which an answer is required, the Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments of Paragraph 43.

44. The averments of Paragraph 44 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants aver that 42 U.S.C. § 9607 (g) has been amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

45. The averments of Paragraph 45 of the Complaint state only legal conclusions as to which no answer is required.

46. Paragraphs 36 through 45 of this Answer are incorporated by reference in response to the allegations of Paragraph 46.

47. The averments of Paragraph 47 of the Complaint state only legal conclusions as to which no answer is required. Federal Defendants nevertheless deny that plaintiff is the natural resources trustee for the natural resources on, over and under the FMPC.

48. Until completion of the RI/FS and the natural resources damages assessment, Federal Defendants are without knowledge or information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraph 48 of the Complaint.

49. The averments of Paragraph 49 of the Complaint state only legal conclusions as to which no answer is required.

50. The averments of Paragraph 50 of the Complaint state only legal conclusions as to which no answer is required.

51. The averments of Paragraph 51 of the Complaint state only legal conclusions as to which no answer is required.

52. The averments of the first sentence of Paragraph 52 are denied. The averments of the second sentence of Paragraph 52 state legal conclusions to which no answer is required.

53. The averments of Paragraph 53 of the Complaint state only legal conclusions as to which no answer is required.

54. Federal Defendants admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985. Both applications remain pending and no permit has been issued. The remaining averments of Paragraph 54 are denied.

55. As to the first sentence of Paragraph 55, the Federal Defendants admit that hazardous materials were placed at FMPC after November 19, 1980, and continue to be placed there. Federal Defendants also admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985, that both applications remain pending, and no permit has been issued. Except as specifically admitted herein, the averments of Paragraph 55 state only legal conclusions as to which no answer is required.

56. The averments of Paragraph 56 of the Complaint state only legal conclusions as to which no answer is required.

57. As to the averments of Paragraph 57, Federal Defendants admit that they filed their RCRA Part A Permit Application on July 6, 1984, and their RCRA Part B Permit Application on October 30, 1985, that both applications remain pending, and no permit has been issued.

58. The averments of Paragraph 58 of the Complaint state only legal conclusions as to which no answer is required.

59. The averments of Paragraph 59 of the Complaint state only legal conclusions as to which no answer is required.

60. The averments of Paragraph 60 of the Complaint state only legal conclusions as to which no answer is required.

61. The averments of Paragraph 61 of the Complaint state only legal conclusions as to which no answer is required.

62. The averments of Paragraph 62 of the Complaint state only legal conclusions as to which no answer is required.

63. The averments of Paragraph 63 of the Complaint are denied.

64. The averments of Paragraph 64 of the Complaint state only legal conclusions as to which no answer is required.

65. The averments of Paragraph 65 of the Complaint state only legal conclusions as to which no answer is required.

66. The averments of Paragraph 66 of the Complaint are denied.

67. The averments of Paragraph 67 of the Complaint state only legal conclusions as to which no answer is required.

68. The averments of Paragraph 68 are denied.

69. The averments of Paragraph 69 of the Complaint state only legal conclusions as to which no answer is required.

70. The averments of Paragraph 70 of the Complaint state only legal conclusions as to which no answer is required.

71. The averments of Paragraph 71 are denied.

72. The averments of Paragraph 72 of the Complaint state only legal conclusions as to which no answer is required.

73. The averments of Paragraph 73 of the Complaint state only legal conclusions as to which no answer is required.

74. The averments of Paragraph 74 of the Complaint state only legal conclusions as to which no answer is required.

75. Federal Defendants deny that they have failed to implement a ground water monitoring system for Pit 4. The remaining averments of Paragraph 75 of the Complaint state only legal conclusions as to which no answer is required.

76. The averments of Paragraph 76 of the Complaint state only legal conclusions as to which no answer is required.

77. The averments of Paragraph 77 of the Complaint state only legal conclusions as to which no answer is required.

78. As to the first sentence of Paragraph 78 of the Complaint, Federal Defendants admit that they first submitted closure plans for the pits at the FMPC at the time that they filed their RCRA Part A Permit Application on July 6, 1984. The averments of the second sentence of Paragraph 78 of the Complaint state only legal conclusions as to which no answer is required.

79. The averments of Paragraph 79 of the Complaint state only legal conclusions as to which no answer is required.

80. The Federal Defendants admit that they have not yet closed Pit 4 and that the final volume of hazardous waste was placed in Pit 4 in approximately April of 1983. Except as specifically admitted, the averments of Paragraph 80 are denied.

81. The averments of Paragraph 81 of the Complaint state only legal conclusions as to which no answer is required.

82. The Federal Defendants admit that they have not yet closed Pit 4. Except as specifically admitted, the averments of Paragraph 82 are denied.

83. The averments of Paragraph 83 of the Complaint state only legal conclusions as to which no answer is required.

84. The averments of Paragraph 84 of the Complaint state only legal conclusions as to which no answer is required.

85. The averments of Paragraph 85 are denied.

86. The averments of Paragraph 86 of the Complaint state only legal conclusions as to which no answer is required.

87. The averments of Paragraph 87 are denied.

88. The averments of Paragraph 88 of the Complaint state only legal conclusions as to which no answer is required.

89. Federal Defendants aver that prior to April of 1984 they maintained schedules requiring regular inspections of the container storage area at the FMPC, that to their best knowledge and belief such inspections were conducted on a weekly basis, and since approximately April of 1984 they have maintained weekly inspections of this area.

90. The averments of Paragraph 90 of the Complaint state only legal conclusions as to which no answer is required.

91. The averments of Paragraph 91 of the Complaint state only legal conclusions as to which no answer is required.

92. The averments of Paragraph 92 are denied.

93. The averments of Paragraph 93 of the Complaint state only legal conclusions as to which no answer is required.

94. The averments of Paragraph 94 of the Complaint state only legal conclusions as to which no answer is required.

95. The averments of Paragraph 95 are denied.

96. The averments of Paragraph 96 of the Complaint state only legal conclusions as to which no answer is required.

97. The averments of Paragraph 97 of the Complaint state only legal conclusions as to which no answer is required.

98. The Federal Defendants admit that as of July of 1984, they had a contingency plan for any FMPC hazardous waste facility. Except as specifically admitted the averments of Paragraph 98 are denied.

99. The averments of Paragraph 99 of the Complaint state only legal conclusions as to which no answer is required.

100. The averments of Paragraph 100 of the Complaint state only legal conclusions as to which no answer is required.

101. The Federal Defendants admit that as of at least June 2, 1984, operating records were kept at the FMPC hazardous facilities containing the information required by law. Except as specifically admitted, the averments of Paragraph 101 are denied.

102. The averments of Paragraph 102 of the Complaint state only legal conclusions as to which no answer is required.

103. The averments of Paragraph 103 of the Complaint state only legal conclusions as to which no answer is required.

104. The averments of Paragraph 104 of the Complaint state only legal conclusions as to which no answer is required.

105. Federal Defendants aver that they have implemented a training program and have maintained records for the FMPC. The remaining averments of Paragraph 105 of the Complaint state only legal conclusions as to which no answer is required.

106. The averments of Paragraph 106 of the Complaint state only legal conclusions as to which no answer is required.

107. The averments of Paragraph 107 of the Complaint state only legal conclusions as to which no answer is required.

108. The averments of Paragraph 108 are admitted.

109. The averments of Paragraph 109 of the Complaint state only legal conclusions as to which no answer is required.

110. The averments of Paragraph 110 of the Complaint state only legal conclusions as to which no answer is required.

111. The averments of Paragraph 111 of the Complaint state only legal conclusions as to which no answer is required.

112. The averments of Paragraph 112 of the Complaint state only legal conclusions as to which no answer is required.

113. The averments of Paragraph 113 are admitted.

114. The averments of Paragraph 114 are admitted.

115. The averments of Paragraph 115 of the Complaint state only legal conclusions as to which no answer is required.

116. The averments of Paragraph 116 are admitted.

117. The averments of Paragraph 117 of the Complaint state only legal conclusions as to which no answer is required.

118. The averments of Paragraph 118 are admitted.

119. The averments of Paragraph 119 of the Complaint state only legal conclusions as to which no answer is required.

120. The averments of Paragraph 120 are admitted.

121. The averments of Paragraph 121 of the Complaint state only legal conclusions as to which no answer is required.

122. The averments of Paragraph 122 are denied.

123. The averments of Paragraph 123 of the Complaint state only legal conclusions as to which no answer is required.

124. The averments of Paragraph 124 are admitted.

125. The averments of Paragraph 125 of the Complaint state only legal conclusions as to which no answer is required.

126. The averments of Paragraph 126 are admitted.

127. The averments of Paragraph 127 of the Complaint state only legal conclusions as to which no answer is required.

128. The averments of Paragraph 128 are denied.

129. The averments of Paragraph 129 of the Complaint state only legal conclusions as to which no answer is required.

130. The averments of Paragraph 130 are denied.

131. The averments of Paragraph 131 of the Complaint state only legal conclusions as to which no answer is required.

132. The averments of Paragraph 132 of the Complaint state only legal conclusions as to which no answer is required.

133. The averments of Paragraph 133 of the Complaint state only legal conclusions as to which no answer is required.

134. The averments of Paragraph 134 of the Complaint state only legal conclusions as to which no answer is required.

135. Paragraphs 36 through 134 of this Answer are incorporated by reference in response to the allegations of Paragraph 135.

136. The averments of Paragraph 136 of the Complaint state only legal conclusions as to which no answer is required.

137. The averments of Paragraph 137 of the Complaint state only legal conclusions as to which no answer is required.

138. The averments of Paragraph 138 of the Complaint state only legal conclusions as to which no answer is required.

139. The averments of Paragraph 139 of the Complaint state only legal conclusions as to which no answer is required.

140. The averments of Paragraph 140 are denied.

141. The averments of Paragraph 141 are denied.

142. The averment is not sufficiently specific to permit an answer. To the extent an answer is required, the averments of Paragraph 142 are denied.

143. The averments of Paragraph 143 are denied.

144. The averments of Paragraph 144 of the Complaint state only legal conclusions as to which no answer is required.

145. The averments of Paragraph 145 of the Complaint state only legal conclusions as to which no answer is required.

PRAYER FOR RELIEF

The Federal Defendants deny that the State of Ohio is entitled to the relief requested in its Complaint and pray for their discharge from the Complaint together with all costs and all other appropriate or available relief.

GENERAL DENIAL

To the extent that any allegations in the Complaint are not specifically answered or addressed herein, such allegations shall be deemed specifically denied.

FIRST DEFENSE

Ohio's Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Ohio's Complaint is barred by the doctrine of sovereign immunity.

THIRD DEFENSE

Ohio's Complaint is barred for lack of subject-matter jurisdiction.

FOURTH DEFENSE

Ohio's claim for response costs are unrecoverable to the extent they are duplicative, not cost effective or otherwise inconsistent with the National Contingency Plan.

FIFTH DEFENSE

Ohio's claim for natural resource damages is limited to any residual damages remaining after implementation of the remedy at the FMPC.

SIXTH DEFENSE

Ohio's recovery of natural resources damages, if any, at the FMPC is limited to the lesser of lost use value or resortation costs.

SEVENTH DEFENSE

The hazardous waste laws and regulations of the State of Ohio do not regulate mixed waste, *i.e.*, hazardous waste mixed with radioactive waste, and therefore the handling of mixed waste at the FMPC is regulated by the provisions of RCRA and the Atomic Energy Act. The State of Ohio is thus not entitled to any relief under on its claims based upon Federal Defendants' handling of mixed waste.

EIGHTH DEFENSE

The Atomic Energy Act preempts any state regulation of source, special and by-product nuclear materials and wastes and the radioactive hazards associated with hazardous wastes and hazardous constituents which have become moixed with source, special or by-product nuclear materials. Therefore, the state of Ohio lack jurisdiction or authority to regulate such materials or waste.

NINTH DEFENSE

The Atomic Energy Act preempts any state regulation of source, special and by-product nuclear materials and wastes when they are mixed with or inextricably intertwined with otherwise hazardous materials or waste. Therefore the State of Ohio lacks jurisdiction or authority to regulate such materials or waste.

TENTH DEFENSE

Counts three through twenty-six of Ohio's complaint are barred by Ohio Rev. Code §§ 2305.07, 2305.11 and other relevant statutes of limitations.

ELEVENTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred by equitable estoppel.

TWELFTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred by laches.

THIRTEENTH DEFENSE

Counts three through twenty-six of Ohio's Complaint are barred because Ohio has by its actions waived its right to seek the relief set forth in those counts.

FOURTEENTH DEFENSE

County twenty-seven of the Complaint is barred by the provisions of section 10 of Executive Order 12580 (January 23, 1987), reprinted at 52 F.R. 2923.

Respectfully submitted,

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Dated: April 28, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

CONSENT DECREE

[Filed Dec. 2, 1988]

WHEREAS, on March 11, 1986, the State of Ohio filed a complaint in the above-captioned case against the United States Department of Energy ("DOE"), NLO, Inc. ("NLO") and NL Industries, Inc. ("NLI");

WHEREAS, Ohio alleges that DOE, NLO, and NLI have violated various provisions of Federal and Ohio law and regulations, and DOE, NLO, and NLI deny any violation of and any liability under any federal or state statute, regulation or common law;

WHEREAS, the parties wish to ensure the safe and environmentally sound handling of mixed and hazardous waste at the FMPC;

WHEREAS, the parties agree that the Federal and Ohio hazardous waste regulations as presently drawn do not impose dissimilar requirements;

WHEREAS, DOE on July 18, 1986 entered into an Agreement with U.S. EPA (hereinafter the agreement

as amended shall be referred to as the "7/18/86 Agreement") pursuant to Executive Order 12088, 43 F.R. 47707 (October 13, 1978), and is currently carrying out a Remedial Investigation and Feasibility Study (hereinafter "RI/FS") pursuant to the 7/18/86 Agreement and the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §§ 9601-9657 (hereinafter "CERCLA");

WHEREAS, the parties wish to resolve Count One and Counts Three through Twenty-Seven of this action without litigation to the extent set forth in Sections V and VII below, and have, therefore, agreed to entry of this Consent Decree without the admission or adjudication of any issue of fact or law.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed as follows:

I. JURISDICTION

The Court has jurisdiction over the matters resolved in this Consent Decree and the parties to the decree.

II. GENERAL PROVISIONS

For purposes of this Consent Decree, the following words and abbreviations have the meanings provided below:

2.1 "DOE" means the United States Department of Energy and its officers, agents, employees, and contractors;

2.2 "Ohio EPA" means Ohio Environmental Protection Agency and its representatives, including any contractor(s) retained by Ohio EPA to perform any monitoring, observation, testing, or other activities related to this Consent Decree;

2.3 "NLO" means NLO, Inc., an Ohio corporation which was the prime contractor at the FMPC through December 31, 1985.

2.4 "NLI" means NL Industries, Inc., a New Jersey corporation.

2.5 Each of the terms "State", "State of Ohio", and "Ohio", includes all agencies and officers of the State of Ohio;

2.6 "FMPC" means the Feed Materials Production Center owned by DOE and located near Fernald, Ohio;

2.7 "C.F.R." means Code of Federal Regulations;

2.8 "OAC" means Ohio Administrative Code;

2.9 "Hazardous waste" means a solid waste which is defined as a hazardous waste in 40 C.F.R. § 261 or OAC § 3745-51-03, but does not include source, special nuclear, or by-product material. For purposes of convenience in the wording of this Consent Decree only (and not binding on the parties outside of this Decree and not for use as a general definition outside Decree), the term "hazardous waste" does not include "mixed waste".

2.10 "Mixed waste" means all waste containing both radioactive waste subject to the Atomic Energy Act and hazardous waste.

2.11 "Treatment", "storage", and "disposal" have the same meaning as the definitions provided therefor in 40 C.F.R. § 260.10 and OAC § 3745-50-10.

III. HAZARDOUS WASTE REQUIREMENTS

3.1 DOE shall conduct its current and future treatment, storage, and disposal of all hazardous and mixed waste at the FMPC in accordance with Federal and Ohio hazardous waste laws and hazardous waste regulations, including but not limited to the permit requirements of these laws and regulations. However, DOE is not required to comply with the above requirements, with regard to mixed waste, where compliance will increase the risk to human safety and health or the environment, or, with respect to hazardous or mixed waste, where the requirements would be inapplicable due to the restrictions of 42 U.S.C. § 6905(a). Should DOE not be required to comply with a hazardous waste requirement due to any

of the circumstances described in the preceding sentence, DOE in consultation with Ohio EPA shall instead handle the hazardous or mixed waste in a manner as protective of human safety and health and the environment as if the hazardous waste requirement had been applied. However, should any of the above referenced requirements conflict with any remedy ultimately selected by U.S. E.P.A. pursuant to CERCLA, such conflicts shall be subject to the provisions of Sections V and XII of this Consent Decree.

3.2 DOE has submitted to Ohio EPA Part A and Part B of the application for an Ohio hazardous waste facility installation and operation permit for the FMPC. Until such time as the Ohio Hazardous Waste Facility Board acts on the permit application for the FMPC, DOE shall not store or dispose of hazardous or mixed waste at any FMPC locations, or treat any such waste at FMPC in any devices, not included in the permit application or subsequent revisions submitted to Ohio EPA. No hazardous or mixed waste from an off-site source not already listed in the FMPC Part B Permit Application, or a revision as of the date of entry of this Consent Decree, shall be stored, disposed of or treated at the FMPC without the prior approval of the State of Ohio. After the Ohio Hazardous Waste Facility Board acts on the permit application for such a facility, DOE shall not store, dispose of, or treat mixed waste at the FMPC except in accordance with an Ohio hazardous waste facility installation and operation permit. Nothing in this Consent Decree shall be construed to preclude DOE from exercising any right it has to appeal an action on the permit application nor shall the Consent Decree be interpreted to predetermine the results of the deliberations of the Ohio Hazardous Waste Facilities Board on the permit application.

3.3 DOE shall store all drums and other containers holding hazardous waste and/or mixed waste in a manner which complies with the containment storage system re-

quirements set forth in 40 C.F.R. § 264.175 and OAC § 3745-55-75.

3.4 DOE shall conduct and document inspections of hazardous waste and mixed waste facilities at FMPC, including container or tank storage areas, landfills, and surface impoundments, in accordance with 40 C.F.R. § 264.15, 40 C.F.R. § 265.15, OAC § 3745-54-15 and OAC § 3745-65-15.[1] These inspections shall be conducted at a frequency sufficient to comply with these rules, but in no event shall they be conducted at a frequency of less than once per week. Upon discovery of any leaks or spills of hazardous or mixed waste from container or tank storage or treatment areas, DOE shall immediately thereafter initiate efforts to stop the spills or leaks, take all appropriate actions necessary to prevent further spills or leaks of hazardous or mixed wastes, and take all appropriate actions possible to contain and recover all spilled and leaked hazardous or mixed waste. Should the groundwater monitoring program reveal the presence of a hazardous or mixed waste, then a groundwater quality assessment will be initiated, and shall be performed consistent with RCRA guidelines and Ohio and Federal law.

3.5 Within ninety (90) days after entry of this Consent Decree, DOE shall complete and submit to Ohio EPA analyses of all hazardous or mixed waste streams produced or received at FMPC. These analyses shall contain the information required by 40 C.F.R. § 265.13 and OAC § 3745-65-13, as well as the radiological characteristics of the waste streams, a description of the process streams producing the wastes, and any applicable EPA hazardous waste number. If any additional hazardous or mixed waste stream is identified at the FMPC after the entry of this Consent Decree, DOE shall complete and

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[1] 40 C.F.R. § 265.15 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.15 applies thereafter. OAC § 3745-65-15 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-15 applies thereafter.

submit these analyses and/or characteristics, consistent with 40 C.F.R. § 265.13 and OAC § 3745-65-13,[2] within ninety (90) days after identifying the waste stream on-site; if any additional hazardous or mixed waste stream is to be received at the FMPC from an off-site source, or is to be produced at the FMPC, DOE shall complete and submit such analyses and/or characteristics before receiving the waste stream from off-site or producing the waste stream on-site.

3.6 DOE shall keep a written operating record at FMPC which contains the information required by 40 C.F.R. § 264.73, 40 C.F.R. § 265.73, OAC § 3745-54-73 and OAC § 3745-65-73.[3] The operating record shall include this information for all hazardous waste and mixed waste which was stored at the FMPC prior to the entry of this Consent Decree (unless it has been since removed from FMPC) and shall be updated whenever additional hazardous or mixed waste is stored there in the future.

3.7 DOE has submitted to Ohio EPA for review and approval a groundwater quality assessment program plan. Ohio EPA has reviewed this plan and identified deficiencies in it. DOE shall correct these deficiencies and resubmit the plan to Ohio EPA within forty-five (45) days after receiving Ohio EPA's comments. DOE shall implement the plan in accordance with the approved timetable.

3.8 The specific requirements spelled out in paragraphs 3.3 through 3.7 above do not replace or supersede any

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[2] 40 C.F.R. § 265.13 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.13 applies thereafter. OAC § 3745-65-13 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application and OAC § 3745-54-13 applies thereafter.

[3] 40 C.F.R. § 265.73 applies until U.S. EPA approval of DOE's Part B hazardous waste application, and 40 C.F.R. § 264.73 applies thereafter. OAC § 3745-65-72 applies until Ohio Hazardous Waste Facility Board approval of DOE's Part B hazardous waste application, and OAC § 3745-54-73 applies thereafter.

additional requirements which may be contained in the regulations cited in those paragraphs or in other hazardous waste laws or regulations, to the extent not inconsistent with the Atomic Energy Act.

IV. CONTROL OF WASTEWATER AND RUNOFF

4.1 Upon entry of this Consent Decree, no "sewage," "industrial waste" or "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01, shall be discharged or placed into Waste Pit #5 or the clear well at the FMPC without prior written approval of Ohio EPA. The only exception to this order is the storm water runoff currently being collected in the waste pit area.

4.2 No water from Waste Pits Number 4, 5, or 6, the biodenitrification surge lagoon, the biodenitrification surge lagoon underdrains, or storm water retention basin underdrains shall be discharged or placed into Paddy's Run, unless prior written approval is obtained from Ohio EPA.

4.3 On or about July 27, 1988, DOE completed a characterization study within the coal storage area and coal storage runoff collection basin area to characterize the existing underlying soil. On or before November 4, 1988, DOE shall submit a report which contains the results of the characterization study including the determined permeability coefficient of the soil core samples and, if necessary, the steps required to modify the existing soil conditions to provide groundwater protection equivalent to that provided by three (3) feet of clay with a permeability coefficient no greater than $1x10^{-7}$ centimeters per second. Ohio EPA agrees to provide a written response to DOE within thirty (30) days of receipt of the report as to whether or not a liner is needed.

[A] In the event Ohio EPA determines a liner is required for the coal pile storage area and/or the coal pile run off collection basin, DOE shall submit a PTI application and install the liner in accordance with schedules approved by Ohio EPA.

[B] In the event that Ohio EPA determines a liner is not required, DOE shall submit a PTI application describing the existing coal pile storage area and coal pile runoff collection and treatment system within ninety (90) days of Ohio EPA's written response to the report.

4.4 DOE has submitted a current, complete NPDES permit renewal application. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall make every effort to manage its wastewater in such a way as to comply with the biochemical oxygen demand, solids, and fecal coliform limitations of its present NPDES permit. Until Ohio EPA issues a new NPDES permit for FMPC, DOE shall comply with all other terms (excluding part I.B), conditions and effluent limitations of its present NPDES permit. DOE shall comply with all terms, conditions, and effluent limitations of its new NPDES permit by the dates specified in the permit. The date for final compliance shall in no case be later than one (1) year after issuance of the Ohio Permit to Install for the biodenitrification effluent treatment system.

4.5 Within one hundred and eighty (180) days of issuance of a new FMPC NPDES permit, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for a biodenitrification effluent treatment system designed to meet the biochemical oxygen demand and suspended solids limitations of the new FMPC NPDES permit.

4.6 By October 1, 1989, DOE shall submit to Ohio EPA a new Permit to Install application, including detail plans, for the full-scale biodenitrification facility. These plans must include all temporary as well as permanent collection, storage, and treatment system components.

4.7 DOE has begun construction of a storm water retention basin, and shall complete construction by December 31, 1988, in accordance with the detail plans approved by Ohio EPA on November 18, 1987 (PTI 05-1043).

DOE shall thereafter operate the storm water retention system in accordance with the approved plans.

4.8 DOE has submitted to Ohio EPA a contingency plan which describes the actions DOE will take to investigate the environmental impact of any future surface water leakage, overflow or bypass from the storm water retention system into the environment, including Paddy's Run. Ohio EPA has fdentified deficiencies in the plan and will transmit these to DOE. DOE shall, within sixty (60) days after receiving notice of these deficiencies, correct these deficiencies and submit a revised plan to Ohio EPA. DOE shall implement the provisions of the approved contingency plan if surface water leaks from, overflows, or bypasses the storm water retention system.

4.9 Sediments accumulating in the biodenitrification surge lagoon and storm water retention basins shall be removed and disposed of in accordance with the maintenance schedules aprpoved in Permits to Install #05-2872 and #05-1043.

.10 DOE shall contain any process area spills and divert the spills for adequate treatment and/or disposal, in accordance with the Spill Prevention and Control Countermeasures Plan to be submitted to Ohio EPA for review and approval within thirty (30) days of the entry of this Consent Decree.

4.11 Pursuant to Ohio EPA Director's Findings and Orders dated June 26, 1987, DOE has submitted to Ohio EPA for review and comment a best management practices (BMP) plan for the control of industrial wastes and other wastes that may be discharged from the FMPC. For the purpose of this section, "industrial wastes" and "other wastes" have the meaning set forth in Ohio Revised Code Section 6111.01(C) and (D). The BMP Plan establishes procedures for inspections, monitoring, preventive maintenance, employee training, material inventory, security and other activities to prevent pollution of surface waters and groundwater in the event of equipment failure, improper operation, precipitation and other

natural phenomena, stormwater runoff and discharges, and other causes.

[A] DOE shall implement the BMP plan upon notification of approval of the plan by Ohio EPA. In the event that Ohio EPA does not approve the BMP plan in its entirety, DOE shall implement those portions of the plan approved by Ohio EPA, correct any deficiencies in the plan noted by Ohio EPA, and resubmit a revised plan for review by Ohio EPA not later than sixty (60) days from notification by Ohio EPA.

[B] DOE shall maintain the BMP plan at the FMPC and shall make it available to Ohio EPA upon request.

[C] DOE shall amend the BMP plan whenever there is a change in facility design, construction, operation, or maintenance which materially affects the facility's potential for discharge of industrial wastes or other wastes into the water of the State.

[D] If Ohio EPA determines that the BMP plan is ineffective in achieving the general objective of preventing the release of industrial wastes or other wastes to the waters of the State, the BMP plan shall be modified by DOE in consultation with Ohio EPA within forty-five (45) days of notification to DOE.

4.12 Pursuant to Ohio EPA Director's Findings and Orders issued June 26, 1987, DOE has submitted to Ohio EPA a report which incorporates a study of the discharge from the FMPC which currently flows from Manhole 175 (Outfall 001) through a pipe to the Great Miami River. This study was conducted to determine whether or not the discharge pipe is a potential source of groundwater

contamination. Should Ohio EPA request changes and/or additions in the report of this study, including any of the recommended alternatives or schedules, DOE shall submit these changes and/or additions to Ohio EPA within thirty (30) days after receiving these requests. All actions and alternatives recommended by the report of the study required in this Paragraph 4.12 and approved by the Ohio EPA shall be implemented in accordance with the schedules approved by Ohio EPA.

4.13 By the twentieth (20th) day of every second month, DOE shall submit a bi-monthly technical progress report to Ohio EPA describing the progress made to comply with this Section IV of the Consent Decree during the previous two months. DOE may combine this report with its ongoing reports being submitted pursuant to the Director's Findings and Orders issued June 4, 1987.

4.14 DOE is enjoined to comply with any permits issued to DOE pursuant to OAC § 6111.03(J) and, with regard to sewage, industrial wastes or other wastes, to comply with OAC § 3745-31-02 and any permits issued pursuant to OAC § 3745-31-02.

V. RESERVATION OF RIGHTS CONCERNING REMEDIAL ACTION

5.1 DOE is currently proceeding with an RI/FS pursuant to the 7/18/86 Agreement. Included within the scope of the RI/FS are work plans, which contain, but are not limited to, the following:

[A] actions which will be taken to determine the locations of hazardous and mixed waste at the FMPC, if any, including but not limited to investigation of the storage pits, the liquid waste incinerator, solid waste incinerator, and the general sump;

[B] actions which will be taken to analyze such waste, including the identification of the analyses to be performed;

[C] actions which will be taken to determine whether hazardous constituents are being released or have the potential to be released from the storage pits into the environment;

[D] actions which will be taken to assess the feasibility of all alternatives available for the permanent disposal of such waste as well as a proposed schedule for each available alternative;

[E] actions which will be taken, if a release of hazardous constituent(s) into the environment is discovered, to assess the feasibility of all alternatives available for remedying contamination of the environment, if any, including a proposed schedule for implementation of each alternative;

[F] a timetable for performing each of the actions described in A through E above and submitting the information obtained from performing these actions;

[G] alternatives for permanent disposal of any hazardous and mixed waste in the storage pits;

[H] a work plan and timetable for studying the sources, nature and extent of groundwater contamination, if any, with nitrates, fluorides, sulfates, chlorides, and other "industrial wastes" and "other wastes," as those terms are defined by Ohio Revised Code Section 6111.01(C) and (D), including, if contamination is discovered, an assessment of the exposure and potential exposure of the public and the environment to these contaminants and compilation of data necessary to develop and select alternatives for abating the sources of contamination and to develop and select cleanup alternatives.

5.2 The activities described in paragraph 5.1 above are also the subject matter of injuntive relief which Ohio has requested against DOE for alleged violations of the Resource Conservation and Recovery Act (hereinafter "RCRA"), Ohio Revised Code Chapter 3734, the Clean Water Act, and Ohio Revised Code Chapter 6111. These alleged violations are contained in Counts Three through Eight and Count Twenty-Five of the Complaint.

5.3 Pursuant to the 7/18/86 Agreement, remedial alternatives will be developed by DOE and selected to address, *inter alia*, the matters described in paragraph 5.1 above.

5.4 It is DOE's position that Ohio EPA is limited to the review and comment provisions and provisions for judicial review set forth in sections 120 and 121 of CERCLA if the state has any disagreement with any matter under the RI/FS, including cleanup standards, investigation methods, timetables and the remedial alternative selected by US EPA. It is Ohio's position that the state has the authority to determine these matters pursuant to Ohio law and RCRA, and to obtain injunctive relief against DOE pertaining to these issues pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint and the statutes invoked by these counts. DOE and the State specifically do not resolve this dispute in this Consent Decree. Each party specifically reserves the right to reopen this action for further litigation for the purpose of resolving any disagreement which Ohio may have with any of these matters under the RI/FS, including, but not limited to, cleanup standards, investigation methods, timetables, or the final remedial action chosen by US EPA under the 7/18/86 Agreement. Ohio reserves the right to request further injunctive relief against DOE pursuant to Counts Three through Eight and Count Twenty-Five of the Complaint should Ohio at any time become dissatisfied with the manner or timeliness of actions or study taken pursuant to the RI/FS or the manner or timeliness of remedial action

occurring after completion of the RI/FS. Each party reserves its rights to assert and defend its respective legal position should the action be reopened for these purposes.

VI. SITE ACCESS

DOE shall provide access to the FMPC to Ohio EPA for the purpose of monitoring, sampling and observing activities carried out under this Consent Decree. Ohio EPA agrees that it will comply with all statutes, rules and regulations for personnel safety and site security. This paragraph shall not be construed to eliminate or restrict any State access to the FMPC which it may otherwise have under Federal or State law.

VII. RECOVERY OF RESPONSE COSTS AND SETTLEMENT OF OTHER MONETARY CLAIMS

7.1 "Response costs" as used in this section means all costs of "removal" or "remedial action," as defined by Section 101(23), (24), and (25) of CERCLA, 42 U.S.C. § 9601 (23), (24), and (25).

7.2 By March 1, preceding each federal fiscal year during which the State expects to incur response costs, the State shall provide DOE with a written estimate of response costs expected to be incurred during the two subsequent fiscal years, based upon the state's best knowledge at the time. By February 1 of each year DOE shall send Ohio EPA a notice requesting this estimate.

7.3 Following the end of each federal fiscal year, the State shall submit to DOE an accounting of response costs incurred during that previous fiscal year. These accountings will specify the manner in which the payment shall be made.

7.4 Except as allowed by Paragraph 7.5 below, within ninety (90) days of receipt of the accounting provided pursuant to Paragraph 7.3, DOE shall reimburse the State in the amounts set forth in the accounting. Payment shall be made by wire transfer or by check in the manner described in the State's accounting.

7.5 In the event that DOE disputes any amounts set forth in the State accounting, DOE may contest the disputed costs by invoking the dispute resolution procedures of Section XII. DOE may contest a cost only on the grounds that the cost is unsupported by the State's documentation, is not a "response cost" under CERCLA, or is inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300 ("NCP"). DOE shall bear the burden of demonstrating that the cost is inconsistent with the NCP.

7.6 Should DOE contest a portion of the costs set forth in an accounting but not all of the costs, the uncontested costs shall be paid by the deadline provided by paragraph 7.4 above. Any costs which DOE must pay as a result of dispute resolution shall be paid within ninety (90) days after resolution of the dispute.

7.7 Not later than thirty (30) days after the entry of this Consent Decree, NLO shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against NLO in this action under Count One and Counts Three through Twenty-seven, the sum of Two Hundred Seventy-Five Thousand Dollars ($275,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund".

7.8 Not later than thirty (30) days after the entry of this Consent Decree, DOE shall pay to the State of Ohio in full and final settlement of disputed claims brought by the State of Ohio against DOE for all past response costs in this action incurred by the state through September 30, 1988, the sum of Three Hundred Thirty-Five Thousand Dollars ($335,000) by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund", and the sum of Eighty Thousand Dollars ($80,000) for litigation costs by certified check or wire transfer to the order of "Ohio Attorney General".

7.9 With regard to the State of Ohio's claims against DOE for civil penalties, the Court has separately granted DOE's Motion to certify for interlocutory appeal the Order Denying Motion to Dismiss issued by the Court on March 18, 1988, which held that the United States has waived sovereign immunity under RCRA and the CWA for the imposition of civil penalties and that DOE could be liable for such penalties in this case. The parties have entered into a stipulation settling the amount of civil penalties to be assessed against DOE, if, after exhaustion of all appellate rights by DOE, the ultimate decision in this case is that a waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims. In such a case, judgment will be entered in accordance with the stipulation. If, after exhaustion of all appellate rights by the State the ultimate decision in this case is that no waiver of Federal sovereign immunity has been made by RCRA or the CWA with regard to any of the State's civil penalty claims, judgment shall be entered on these issues in accordance with the ultimate decision.

VIII. RELEASES

8.1 Except as specified below, the State hereby releases, covenants not to sue and not to bring any action, whether civil, criminal or for administrative findings and orders, against NLO, NLI, the United States or any department or agency thereof, or any past or present officer, director, official, employee, agent, or contractor (and any past or present official, officer, director, employee, agent or sub-contractor of such contractor), of NLO, NLI, or the United States, with respect to the claims contained in Count One and Counts Three through Twenty-Seven of the Complaint filed in this action.

8.2 The parties recognize that this Consent Decree does not address any of the claims contained in Count Two of the Complaint. This Count is stayed until completion of the RI/FS, and thus remains pending. This

Consent Decree also does not resolve the matters reserved in Section V.

8.3 By executing this Consent Decree, the State of Ohio expressly reserves for further action or enforcement and does not discharge, release, or in any way affect any right, demand, claim, or cause of action which it has, or may have, against any person or entity not released in paragraph 8.1 above.

8.4 The parties agree to cooperate with each other in identifying other potential sources of contamination which may affect the FMPC or the surrounding area.

IX. COMPLIANCE

Except as specifically set forth in this Consent Decree, DOE shall not be excused from compliance with any applicable federal and state laws in carrying out the provisions of this Consent Decree. DOE agrees to advise the State of Ohio of its efforts to obtain the appropriated funding necessary to implement this Consent Decree. The State of Ohio and DOE agree that in any judicial proceeding seeking to enforce the terms of this Consent Decree and/or to find DOE in contempt for failure to comply or for delay in compliance with such terms, DOE may raise as a defense that its failure or delay was caused by circumstances beyond its control or that such failure or delay was caused by the unavailability of appropriated funds. While the State of Ohio disagrees that such defenses exist, the parties do agree and stipulate that it is premature at this time to raise and adjudicate the existence of such defenses.

X. PERMITS AND APPROVALS

The State of Ohio will use its best efforts to review in a timely manner, following DOE application, any permits necessary for DOE to carry out the work required pursuant to this Consent Decree.

XI. USE OF DECREE

This Consent Decree was negotiated and executed by the parties in good faith to avoid expensive and protracted litigation and is a settlement of claims which were vigorously contested, denied and disputed as to validity and amount. The execution of this Consent Decree is not an admission of liability with regard to any issue dealt with in this Consent Decree. Accordingly, it is the intention of the parties, the parties hereby agree, and the Court Orders, that with the exception of this proceeding, any proceeding to adjudicate a permit application (but only to the extent necessary to prove the requirements of the Consent Decree), any proceeding reserved under Section V, and any other proceeding brought by the parties to enforce this Consent Decree, this Consent Decree shall not be admissible in any judicial or administrative proceeding whether civil or criminal, or in state or federal court, and regardless of whether the gravamen of such action or proceeding is based in tort, contract or statute.

XII. RESOLUTION OF DISPUTES

12.1 Should Ohio or DOE have a good faith dispute over the interpretation of this Consent Decree, over whether a term of this Consent Decree has been violated, or over the amount of response costs paid pursuant to Section VII, or if the actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree conflict with actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement, the procedures of this section shall apply except as specifically set forth elsewhere in this Consent Decree. Because Ohio and DOE disagree over whether actions or requirements imposed on DOE by Ohio pursuant to this Consent Decree take precedence over actions or requirements imposed on DOE by U.S. EPA pursuant to the 7/18/86 Agreement in the event of a conflict between the two,

this Consent Decree shall not be construed to establish the authority of one over the other. Each party reserves its right to assert and defend its respective legal position on this issue should such a conflict not be resolved by the parties pursuant to this section of the Consent Decree.

12.2 If either Ohio or DOE believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, either party may petition the Court for relief without following the dispute resolution procedures of this section.

12.3 During the pendency of any dispute, Ohio and DOE agree that they shall continue to implement those portions of this Consent Decree which are not in dispute and which Ohio determines can be reasonably implemented pending final resolution of the issue(s) in dispute. If Ohio determines that all or part of those portions of work which are affected by the dispute should stop during the pendency of the dispute, DOE shall discontinue implementing those portions of the work. Ohio and DOE agree they shall make reasonable efforts to informally resolve all disputes.

12.4 DOE shall, within fifteen (15) days of any action by Ohio which it is disputing, provide Ohio with a written notice of dispute. DOE shall, within thirty (30) days of any such action by Ohio which it is disputing, provide Ohio with a written statement of dispute setting forth the nature of the dispute, DOE's position with respect to the dispute and the information DOE is relying upon to support its position. If DOE does not provide such written notice within the fifteen (15) day period, or after such notice fails to provide a written statement to Ohio within the thirty (30) day period, DOE shall be deemed to have agreed to the position taken by Ohio.

12.5 Upon receipt of the written statement of dispute, Ohio and DOE shall engage in dispute resolution among the project coordinators. The project coordinators

shall have fourteen (14) days from the receipt by Ohio of the written statement of dispute to resolve the dispute. During this period the project coordinators shall meet or confer by telephone as many times as necessary to discuss and attempt resolution of the dispute. If a resolution cannot be reached on any issue within this fourteen (14) day period, either Ohio or DOE may, by written notice, elevate the dispute to the Dispute Resolution Committee (DRC) for resolution.

12.6 DOE and Ohio shall each designate one individual to serve on the DRC. The individuals designated to serve on the DRC shall be those designated in Subparagraph 12.7, or their delegate authorized to serve on the DRC on behalf of such designated individual, for the purposes of dispute resolution under this Consent Decree. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached pursuant to paragraph 12.5. If both designated members of the DRC do not agree on a resolution of the dispute within thirty (30) days, either party may institute an action in this Court to resolve the dispute under this Consent Decree.

12.7 The Ohio designated member of the DRC is the Chief, Division of Solid and Hazardous Waste Management, Ohio EPA. The DOE designated member is the DOE Site Manager. Notice of any delegation of authority from a Party's designated member on the DRC shall be provided to all other Parties.

12.8 The pendency of any dispute under this Part shall not affect DOE's responsibility for timely performance of the work required by this Consent Decree, except that the time period for completion of work affected by such dispute shall be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein if the parties agree that the performance of such work could not reasonably continue during the pendency of such dispute. All elements of the work re-

quired by this Consent Decree which are not affected by the dispute shall continue and be completed in accordance with the work plan schedule.

12.9 Within fourteen (14) days of resolution of any dispute, DOE shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Consent Decree according to the amended plan, schedule or procedures.

12.10 Resolution of a dispute pursuant to this section of the Consent Decree constitutes a final resolution of any dispute arising under this Consent Decree.

12.11 In the case of a dispute which is referred to the DRC and which involves any potential conflict with DOE's actions under the RI/FS or the 7/18/86 Agreement (including but not limited to cleanup standards, investigation methods, timetables and remedial actions), an appropriate representative from U.S. EPA shall be invited to participate in the deliberations of the DRC. If the DRC is unable to resolve the dispute, Ohio and DOE retain the rights described in Section V of this Consent Decree.

12.12 In any dispute subject to dispute resolution, the parties may by written agreement modify the procedures of subparagraphs 12.1 through 12.11 above, including but not limited to an extension or shortening of the times therein or the waiver of any provision set forth therein.

XIII. EFFECTIVE AND TERMINATION DATES

13.1 This Consent Decree shall be effective upon the date of its entry by the Court.

13.2 This Consent Decree shall terminate as to DOE upon completion of the mandatory relief ordered herein, or upon the passage of five (5) years from its effective date, whichever is later.

13.3 This Consent Decree shall terminate as to NLO upon the payment in full of the amounts required in Paragraph 7.7.

XIV. MISCELLANEOUS

14.1 DOE shall require that all of its contractors operating the FMPC comply with all applicable hazardous waste and water pollution laws and the provisions of this Consent Decree.

14.2 Without predetermining whether or not the President can exempt the facility from any provisions of this Consent Decree, nothing in this Consent Decree shall preclude, restrict or expand any right or authority of the President of the United States contained in 33 U.S.C. § 1323, 42 U.S.C. § 6961, or 42 U.S.C. § 9620(j).

14.3 The Court shall maintain jurisdiction of the claims of the State for the purpose of enabling the parties to apply to the Court for any further orders that may be necessary to construe, carry out, or enforce compliance with the terms and conditions set forth in this Consent Decree.

SO ORDERED this 2nd day of December, 1988.

/s/ S. Arthur Spiegel
S. ARTHUR SPIEGEL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-1-86-0217
Judge Spiegel

STATE OF OHIO, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
DEFENDANTS

STIPULATION BETWEEN THE DEPARTMENT OF ENERGY AND THE STATE OF OHIO RELATING TO THE STATE OF OHIO'S CLAIMS FOR CIVIL PENALTIES

[Filed Dec. 2, 1988]

I. INTRODUCTION

On March 18, 1988, the Court denied the Department of Energy's ("DOE") Motion to Dismiss and ruled that the United States has waived federal sovereign immunity under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i ("RCRA"), and the Clean Water Act, 33 U.S.C. §§ 1251-1376 ("CWA"), for the imposition of civil penalties and that the State of Ohio is entitled to assert civil penalty claims against DOE in this case. On September 23, 1988, the Court certified its March 18, 1988 Order for interlocutory appeal to the 6th Circuit Court of Appeals, and DOE filed its Motion for Interlocutory Appeal with the 6th Circuit on October 3, 1988.

The parties have now negotiated a Consent Decree which settles all claims in this action except Ohio's claims

for Natural Resource Damages under Count Two (which is stayed until completion of the Remedial Investigation/ Feasibility Study) and Ohio's claims for civil penalties.

In order to save both the Court and the parties the enormous time and expense of litigating Ohio's civil penalty claims should this matter come to trial prior to completion of the appeal, or should the appellate court affirm this Court's Order, the parties have entered into this Stipulation to provide for disposition without trial of Ohio's civil penalty claims after resolution of all appeals which are pursued concerning the March 18, 1988 Order Denying Motion to Dismiss. As provided herein, payments will be made by DOE, if at all, the judgment entered pursuant to this Stipulation, only after final resolution of all appeals of the March 18, 1988 Order pursued by the parties, including a petition for a writ of certiorari from the United States Supreme Court.

For purposes of this Stipulation, "completition of the appeal" shall mean the exhaustion of all appeals of the March 18, 1988 Order, including any remands and appeals of such remands, and shall occur on the later of (a) the last date on which a petition for a writ of certiorari can be filed in the United States Supreme Court with regard to a decision in this case by the United States Court of Appeals for the Sixth Circuit, if such a petition is *not* filed; (b) if a petition for a writ of certiorari is filed, the date on which the petition is denied by the Supreme Court, or if a petition for rehearing such denial is filed, the date on which the petition for rehearing is denied; or (c) if a petition for writ of certiorari is granted, the date on which the opinion or order of the Supreme Court is issued, or if a petition for rehearing is filed, the date on which the petition for rehearing is denied or the final opinion or order on rehearing is issued.

It is the agreement of the parties that, if civil penalties are paid by DOE pursuant to this Stipulation, the maximum civil penalty for all of Ohio's hazardous waste claims

in this case shall be a total of $125,000, and the maximum civil penalty for all of Ohio's water pollution claims in this case shall be $125,000. Thus, only one of the three alternative provisions set forth under the hazardous waste claims shall be entered as a judgment, and only one of the three alternative provisions set forth under the water pollution claims shall be entered as a judgment.

II. HAZARDOUS WASTE CLAIMS (Counts Three through Sixteen)—

2.1 If, after completition of the appeal, the ultimate decision holds that RCRA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under Ohio state hazardous waste laws, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Three through Sixteen, pay to the State of Ohio the sum of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties, by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio", for deposit into the "Hazardous Waste Cleanup Fund".

2.2 If, after completition of the appeal, the ultimate decision holds that RCRA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under Ohio state hazardous waste laws, but that RCRA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under RCRA, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of

disputed claims made by the State of Ohio against DOE under Counts Three through Sixteen, arrange for payment to the United States Treasury of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties. Ohio's civil penalty claims under state law in these counts will be dismissed.

2.3 If, after completition of the appeal, the ultimate decision holds that RCRA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under either Ohio state hazardous waste laws or under RCRA, the civil penalty claims contained in Counts Three through Sixteen shall be dismissed.

III. WATER POLLUTION CLAIMS (Counts Seventeen through Twenty-Six)—

3.1 If, after completition of the appeal, the ultimate decision holds that the CWA has waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under state water pollution control laws, a Consent Judgment shall be entered as follows:

DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Seventeen through Twenty-Six, pay to the State of Ohio the sum of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties, by certified check or by wire transfer payable to the order of "Treasurer, State of Ohio".

3.2 If, after completion of the appeal, the ultimate decision holds that the CWA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under state water pollution control laws, but that the CWA has waived sovereign immunity to allow the State of Ohio to

bring suit against DOE for civil penalties claims imposed under the CWA, a Consent Judgment shall be entered as follows:

> DOE shall, not later than thirty (30) days after completition of the appeal, and in full settlement of disputed claims made by the State of Ohio against DOE under Counts Seventeen through Twenty-Six, arrange for payment to the United States Treasury of One Hundred Twenty-Five Thousand Dollars ($125,000) as civil penalties. Ohio's civil penalty claims under state law in these counts will be dismissed.

3.3 If, after completition of the appeal, the ultimate decision holds that the CWA has not waived federal sovereign immunity to allow the State of Ohio to bring suit against DOE for civil penalties claims imposed under either Ohio state water pollution control laws or under the CWA, the civil penalty claims contained in Counts seventeen through twenty-six shall be dismissed.

IV. IMPLEMENTATION

After completion of the appeal, DOE and Ohio will file appropriate pleadings to implement this Stipulation. If the parties are unable to file such appropriate pleadings by agreement, either party may request the Court to enter judgment in accordance with this Stipulation.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 90-1341

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,
PETITIONERS

v.

OHIO, ET AL.

ORDER ALLOWING CERTIORARI

Filed June 3, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. This case is consolidated with 90-1517, *Ohio, et al.* v. *United States Department of Energy, et al.* and a total of one hour is allotted for oral argument.

June 3, 1991

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